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LIST OF OFFICERS AND COMMITTEES

OF THE

MASSACHUSETTS BAR ASSOCIATION

FOR 1921–1922.

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Committee on Publication of the Massachusetts Law Quarterly.

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ARTHUR LORD.
GEORGE R. NUTTER.
THE SECRETARY.

Special Committee on Uniform Laws.

ROBERT G. DODGE, *Chairman.*
ROBERT P. CLAPP.
GEORGE P. DRURY.
THE SECRETARY.

List of Past Presidents of the Association.

RICHARD OLNEY, of Boston, 1909–1910.
ALFRED HEMENWAY, of Boston, 1910–1911.
CHARLES W. CLIFFORD, of New Bedford, 1911–1912.
JOHN C. HAMMOND, of Northampton, 1912–1913.
MOORFIELD STOREY, of Boston, 1913–1914.
HERBERT PARKER, of Lancaster, 1914–1915.
HENRY N. SHELDON, of Boston, 1915–1916.
CHARLES E. HIBBARD, of Pittsfield, 1916–1917.
ARTHUR LORD, of Plymouth, 1917–1918.
JOHN W. CUMMINGS, of Fall River, 1918–1919.
FREDERICK P. FISH, of Brookline, 1919–1920.
EDWARD W. HUTCHINS, of Boston, 1920–1921.

OFFICERS OF THE AMERICAN BAR ASSOCIATION FOR 1921–1922.

President: C. A. SEVERANCE, 1512 Merchants National Bank Building, St. Paul, Minn.

Secretary: W. THOMAS KEMP, 901 Maryland Trust Building, Baltimore, Md.

Treasurer: FREDERICK E. WADHAMS, 78 Chapel St., Albany, N.Y.

Vice-President for Massachusetts: ARTHUR LORD, 70 State St., Boston.

Member of General Council for Massachusetts: JOHN LOWELL, 54 Devonshire St., Boston.

Local Council for Massachusetts:

JOHN W. MASON, Northampton.
JOHN E. HANNIGAN, Barristers Hall, Boston.
REGINALD H. SMITH, 60 State St., Boston.
JAMES M. ROSENTHAL, Pittsfield.

THE ANNUAL MEETING.

The annual meeting of the Massachusetts Bar Association was held at the New Bedford Hotel, New Bedford, Saturday, October 15, 1921.

The meeting was called to order by President E. W. Hutchins at 11:30 A. M.

THE PRESIDENT.—We first proceed to the report of the Membership Committee and the election of new members, in order to give applicants a chance if they wish to vote at this meeting, providing they be present.

The following applicants for membership were recommended by the Membership Committee and a ballot being taken were declared elected.

Mrs. Rose Kingsley, 1572 Mass. Ave., Cambridge.
Mrs. Mary A. Costello, 40 Court St., Boston.
Mrs. Sadie Lipner Shulman, 101 Tremont St., Boston.
Miss Helen West Bradley, 55 Congress St., Boston.
Mrs. Pauline Nelson Hartstone, 40 Court St., Boston.
Mrs. Emma Fall Schofield, Malden.
Lawrence E. Green, 60 State St., Boston.
Howard N. Brown, 70 State St., Boston.
Andrew Marshall, Sears Bldg., Boston.
Horace E. Allen, 3rd National Bank Bldg., Springfield.
John V. Carchia, 120 Langdon Ave., Watertown.
Edward Hutchins, Sears Bldg., Boston.
Arthur W. Blakemore, 40 Central St., Boston.
Oliver Mitchell, 99 State St., Boston.
Robert E. Goodwin, 84 State St., Boston.
Samuel Hoar, 84 State St., Boston.
George K. Gardner, 84 State St., Boston.
Edward C. Thayer, 84 State St., Boston.
Leverett Saltonstall, 55 Congress St., Boston.
Wilmot R. Evans, Jr., 15 Beacon St., Boston.
Odin Roberts, 209 Washington St., Boston.

Benjamin B. Barney, 11 Masonic Bldg., New Bedford.
Joseph T. Kenney, Merchants Bank Bldg., New Bedford.
Samuel Barnet, 774 Purchase St., New Bedford.
Philip Barnet, 774 Purchase St., New Bedford.
Justus A. Briggs, Jr., 18 Masonic Bldg., New Bedford.
Edward J. Harrington, 2 Masonic Bldg., New Bedford.
George H. Potter, Bookstore Bldg., New Bedford.
Merton C. Fisher, 37 Masonic Bldg., New Bedford.
Isaiah C. Dade, Five Cents Sav. Bank Bldg., New Bedford.
Charles N. Serpa, 16 Masonic Bldg., New Bedford.
Gerrett Geils, Jr., 34 Masonic Bldg., New Bedford.
Thomas A. Cunniff, 1208 Acushnet Ave., New Bedford.
Patrick M. Doyle, 307 Bookstore Bldg., New Bedford.
William R. Freitas, 194 Union St., New Bedford.
John M. Bullard, 5 Masonic Bldg., New Bedford.
Eliot N. Jones, 50 State St., Boston.
Harris H. Gilman, 84 State St., Boston.
Jacob J. Kaplan, 161 Devonshire St., Boston.
Alfred L. Fish, 161 Devonshire St., Boston.

The Secretary read the report of the Executive Committee.

REPORT OF THE EXECUTIVE COMMITTEE.

A detailed report of the action of this Committee, at its meeting on February 8, 1921, relating to the report of the Attorney General, and its support of the proposal for a declaratory act recognizing the right and duty of the Attorney General to appear before the Grand Jury and any other tribunal on behalf of the Commonwealth whenever in his judgment the public interest required; and its opposition before the Legislature to the proposed bill to prevent his appearance before the Grand Jury without the request of the local District Attorney, was submitted in their February Quarterly for 1921 (Vol. VI., No. 3, p. 43). As pointed out in the note on page 107 of the May number of the Quarterly, the opinion of Chief Justice Rugg in *Commonwealth* v. *Kozlowsky,* handed down in May, establishes the position of the Attorney General in such a way that a declaratory act seems now unnecessary.

At the meeting on February 8th, the office of the United States Attorney was discussed and the votes were passed which are quoted in the following letter:

FEBRUARY 12, 1921.

HON. HENRY CABOT LODGE,
United States Senate,
Washington, D. C.

DEAR SIR:

At a meeting of the Executive Committee of the Massachusetts Bar Association on Tuesday, February 8, 1921, the following vote was passed:

> "VOTED that in view of the importance of the selection at this time of a man well fitted for the office of United States Attorney for the District of Massachusetts, the Executive Committee of the Massachusetts Bar Association will be glad to co-operate, and respectfully requests an opportunity to present their views to Senator Lodge before the choice is made."

It was further

> "VOTED that the secretary send a copy of the foregoing vote to Senator Lodge accompanied by a letter of inquiry as to how in his judgment the committee may best co-operate with him in the matter."

If the committee of this association can be of assistance in this matter and you will indicate to me how, in your opinion, such assistance may best be rendered, I will bring the matter promptly before the president of the association for appropriate action.

Yours respectfully,

F. W. GRINNELL,
Secretary.

The secretary having received a reply from Senator Lodge stating that he would be very glad to know their opinion, another meeting was called for February 23d, and the following letter was sent:

FEBRUARY 23, 1921.

HON. HENRY CABOT LODGE,
United States Senate,
Washington, D. C.

DEAR SIR:

A meeting of the Executive Committee of the Massachusetts Bar Association having been called for February 23, 1921, at 2.30 P. M., to consider what, if any, action should be taken in regard to the office of United States Attorney for the District of Massachusetts, the unanimous opinion of those present at the meeting was in support of Hon. Robert O. Harris for the position, and I was requested to communicate this opinion to you.

Yours respectfully,

F. W. GRINNELL,
Secretary.

A joint meeting of the Executive Committee and the Committee on Legislation was called for May 16, 1921, to consider the recommendation of the Judicature Commission for a Judicial Council then pending before the Judiciary Committee of the Legislature. After discussion, the following signed vote was sent to the Chairman of the Judiciary Committee:

> At a joint meeting of the Executive Committee and Committee on Legislation of the Massachusetts Bar Association on May 16, 1921, the undersigned members being present, it was
>
> VOTED: That it was the sense of the meeting that the bill for a judicial council as recommended in the Report of the Judicature Commission on pages 135-6 be supported.
>
> (Signed) JAMES A. LOWELL, STOUGHTON BELL, HENRY M. HUTCHINGS, ROBERT WALCOTT, CHARLES MITCHELL, JEREMIAH SMITH, JR., JOHN F. CRONAN, EDMOND JOHN FORD, F. W. GRINNELL.

A copy of the above was sent also to each member of both committees who was unable to be present, and communica-

tions were subsequently received from Messrs. Edward W. Hutchins of Boston, Richard P. Coughlin of Taunton, John Barker and James M. Rosenthal of Pittsfield, and E. K. Arnold of Boston, in support of the vote.

The next meeting of the Committee was held on July 12, 1921, to consider the time and plans for the annual meeting. It was voted to hold the meeting at New Bedford, and the President and Secretary and Mr. Mitchell, of New Bedford, were appointed a committee to arrange for the meeting.

Hitherto it has been the custom to serve the annual dinner at the expense of the Association without charge to members. This has amounted to a large annual bill to the Association, not only for the dinners that were eaten and enjoyed, but for those which had to be guaranteed because members sent word that they were coming and then were wasted because men gave out without notice. The annual wasting of the funds of the Association by this process has averaged perhaps about $100, making a total, probably, of about $1000, since the Association was organized, which might have been used for other purposes. With dues of only $5 and the cost of printing, paper, and everything else going up, the funds of the Association could not stand this drain indefinitely, and accordingly, the Committee believed that if the professional work of the Association was to be continued as it should be, the practice of providing an annual free dinner must be given up and the usual practice of other similar organizations adopted of charging for the dinner.

A list of new members was printed in the February number of the magazine at page 26. Since then the following new members approved by the Committee on Membership have been elected by the Executive Committee:

Emerson W. Baker, 327 Main St., Fitchburg.
Charles P. Curtis, Jr., 30 State St., Boston.
Leon C. Guptill, 704 Tremont Bldg., Boston.
William G. Rowe, Brockton.
John D. Wright, Brookline.

Respectfully submitted,

F. W. GRINNELL,
Secretary.

MR. ROSENTHAL of Pittsfield.—Mr. President, there is just one point I would like to bring up, because it is a matter of a policy. That is the matter in connection with the nomination or suggestions for the nomination of the United States Attorney. Now, along with every one else I consider the nomination of Judge Harris admirable, but I doubt very much the propriety of the Massachusetts Bar Association suggesting names for any office which is regarded not as strictly judicial in its nature but which is regarded as a political office which changes with the administration. I think we exceed our function when we make recommendations in that regard, and in the future I hope for my own part that it will not be done.

THE PRESIDENT.—Do you wish to make any motion?

MR. ROSENTHAL.—No, I don't wish to make any motion. I just bring it up for a matter of discussion. It seemed to me as I read it in the newspapers at the time that it was improper for the Association and for any of its committees acting in the name of the Association to make suggestions for offices which are regarded by the community at large as political in their nature.

THE PRESIDENT.—Would you like to have the vote put on that before the vote is taken on the acceptance of the report?

MR. ROSENTHAL.—That makes no difference to me.

The report was accepted.

THE PRESIDENT.—Will you bring up your motion later for a discussion of the subject mentioned?

MR. ROSENTHAL.—If the President considers it worth while.

THE PRESIDENT.—Well, the Bar Associations are all of them having difficulty with a similar question, namely, whether they shall go to the Governor with suggestions or wait until the Governor comes to them and asks them—whether they shall say in the first place to the Governor, "We are ready to help you if you want us to, but we do not propose to volunteer." That is a very interesting question and I should think your question might well be discussed with it.

The Treasurer, Mr. Rugg, presented his annual report, which is abstracted as follows:

ABSTRACT OF TREASURER'S REPORT.

Balance as of December 1, 1920	$747.31	
Savings Department Merchants National Bank	2,022.50	
Received from Annual Dues, interest on deposits, etc.,	4,088.77	
Interest on Savings Deposit	92.55	
General Expenses of the Association		$3,901.16
Balance October 14, 1921		934.92
Savings Department as above		2,115.05
	$6,951.13	$6,951.13

CHARLES B. RUGG,
Treasurer.

MR. RUGG.—The payments are rather a long list, which I will not read through. The principal items are the dinner last year at the Boston City Club, $631; the December Quarterly, which cost $1180, and the other Quarterlies have been $300 and $400. The total expenditures have been $3900. The balance on hand, $934.92 in the checking account and $2115.05 in the savings account.

The report was accepted subject to audit and placed on file.*

MR. FORBUSH.—Perhaps I may preface my report by saying that the Grievance Committee of the Massachusetts Bar Association is not in the limelight at present. The Bar Association of the City of Boston handles all grievances for Suffolk County, the Bar Association of the County of Middlesex handles all grievances for that county, and so far we have been untouched by the prevailing wave of investigation.

Mr. Forbush then read the report as follows:

REPORT OF COMMITTEE ON GRIEVANCES.

The Committee on Grievances has held two meetings during the past year, at each of which a majority of the members were present. Six complaints have been considered at these meetings. Three of these have been dismissed, after full investigation.

In one more case the original oral statement of the complainant indicated a substantial grievance. He was requested to call upon the Secretary of the committee, give his full story, and make out a formal written complaint, but failed to

* Subsequently the Auditing Committee, Messrs. Forbush and Grinnell, reported the account correct.

do so. The matter was then referred to a member of the local bar of the city where the attorney complained of was in practice. Repeated efforts on the part of the local attorney to get in touch with the complainant utterly failed; and the committee was thus obliged to drop the matter from further consideration for the present at least.

It was voted at the last meeting to dismiss one other complaint unless further evidence is submitted to the committee by the complainant before the next meeting.

The only other matter now undisposed of, involves some unusual questions as to jurisdiction and procedure which are now under investigation, as a necessary preliminary to any formal action.

We are glad to state that most of the complaints brought to our attention are frivolous or unfounded; and in many cases are the result of lack of tact on the part of the attorneys or their failure to sufficiently explain to ignorant clients the full details of the matters involved or the necessary delays of legal process. Such matters are usually disposed of by the faithful and efficient Secretary.

The committee has fully considered and discussed the matter referred to it at the last annual meeting, viz:—the difficulties arising out of the concurrent jurisdiction of the grievance committees of the various county associations and of the state association.

As a part of such consideration, inquiries have been made of various prominent members of local bar associations as to their views on this question; and a great conflict of opinion appears.

It appears to this committee that any action by this association at the present time would not be helpful, and that the whole question will be likely to work itself out naturally in due time. The committee, therefore, recommends that no action be taken by the association.

Respectfully submitted,

FRANK M. FORBUSH,

Chairman.

The report was accepted and ordered placed on file.

REPORT OF COMMITTEE ON JUDICIAL APPOINTMENTS.

To Massachusetts Bar Association:

The Committee on Judicial Appointments faces the dilemma on the one hand that it is hardly desirable or feasible to take formal action as to who should be suggested as appropriate appointments to the Bench when there is no vacancy, and on the other, the appointments in recent years have followed the occurrence of the vacancy so soon as to leave the Committee little time for deliberation.

The Committee met as soon as might be after the resignation of Mr. Justice White. The Committee was urged to consider the importance of having a Justice of the Superior Court resident in Berkshire County. They also considered several names of those believed to be fitted for appointment to the Superior Court from various parts of the State. Before making any recommendation it seemed to the Committee desirable to ascertain whether this would be of assistance to the Governor. Accordingly, the Chairman was requested to communicate with the Governor with a view to establishing relations between himself and the Bar Association of the Commonwealth which would give the Governor the benefit of such assistance as the Committee might be able to give him in the matter of judicial appointments.

The Governor welcomed this effort, and expressed his desire to have the assistance which this Association can give in laying before him their knowledge, gained from professional contacts with lawyers under consideration for such appointments.

Mr. Justice Burns of Pittsfield was nominated by the Governor on the following day.

On the resignation of Mr. Justice Shaw the Committee did not find it feasible to meet before the nomination of Mr. Justice Qua.

The Committee as such cannot properly take to itself the credit for the excellence of these two appointments.

No other appointments have been made to the Supreme Judicial Court or to the Superior Court or to the Federal

Courts for this District since the constitution of this Committee.

Respectfully submitted,
For the Committee,
EDWARD F. MCCLENNEN,
Chairman.

OCTOBER 15, 1921.

The report was accepted.

The report of the Nominating Committee was read and a ballot being taken, the persons named in the list printed at the beginning of this number, were elected.

REPORT OF THE COMMITTEE ON LEGAL EDUCATION.

Your committee has no extended or formal report to make at this time concerning legal education in this Commonwealth, and no occasion for the action of this committee has been called to its attention.

It will not be amiss, however, to state that in 1920 the American Bar Association, acting through its Section on Legal Education, instructed the chairman of that section, Elihu Root, to appoint a special committee who should report in 1921

> "its recommendations in respect to what, if any, action shall be taken by this Section and by the American Bar Association to create conditions which will tend to strengthen the character and improve the efficiency of persons to be admitted to the practice of law."
> (Report of 1920, page 466.)

Pursuant to these instructions a special committee was appointed. This committee sent a "questionnaire" to examiners for the Bar and to various committees and to others throughout the United States. The answers of the persons questioned were collated by the special committee, and the results reported to the Section on Legal Education and by it reported together with certain resolutions to the American Bar Association at its annual meeting in September,

1921. Mr. Root presented the resolutions,—and moved the adoption of them. They were as follows:

RESOLVED,

(1) The American Bar Association is of the opinion that every candidate for admission to the bar shall give evidence of graduation from a law school complying with the following standards:

(a) It shall require as a condition of admission at least two years of study in a college.

(b) It shall require its students to pursue a course of three years' duration if they devote substantially all of their working time to their studies, and a longer course, equivalent in the number of working hours, if they devote only part of their working time to their studies.

(c) It shall provide an adequate library available for the use of the students.

(d) It shall have among its teachers a sufficient number giving their entire time to the school to insure actual personal acquaintance and influence with the whole student body.

(2) The American Bar Association is of the opinion that graduation from a law school should not confer the right of admission to the bar, and that every candidate should be subjected to an examination by public authority to determine his fitness.

(3) The Council on Legal Education and Admissions to the Bar is directed to publish from time to time the names of those law schools which comply with the above standards and of those which do not and to make such publication available, so far as possible, to intending law students.

(4) The President of the Association and the Council on Legal Education and Admissions to the Bar are directed to co-operate with the state and local bar associations to urge upon the duly constituted authorities of the several states the adoption of the above requirements for admission to the bar.

(5) The Council on Legal Education and Admissions to the Bar is directed to call a conference on legal educa-

tion in the name of the American Bar Association, to which the state and local associations shall be invited to send delegates, for the purpose of uniting the bodies represented in an effort to create conditions favorable to the adoption of the principles above set forth.

A vigorous discussion of the resolutions followed. A summary of the debate appears in the September number of the *American Bar Association Journal.* At the close of the debate the resolutions were adopted.

SAMUEL C. BENNETT,
Chairman.

OCTOBER 15, 1921.

The report was accepted.

THE SECRETARY.—I move, Mr. Chairman, that the meeting proceed to discuss any other business which may be brought up before taking up the discussion of the Judicature report and the report on legislation which is devoted largely to that subject. I don't know whether there are any other subjects to be brought up or not.

THE PRESIDENT.—Are there any other subjects to be brought up for discussion other than the report of the Judicature Commission? [No response.] Does any one desire to bring any matter to the attention of the Association?

THE SECRETARY.—I move, then, Mr. Chairman, that we proceed to the discussion of the subject, and perhaps the best introduction to it is the report of the Committee on Legislation, which takes up the various recommendations separately. The report is printed in the August number of the Quarterly.

The motion was carried.

THE PRESIDENT.—I want to tell a story before we proceed to the discussion, because I am interested in having this discussion full and having everybody say something on the subject. It is a story of Sam Elder's. It concerns a funeral in the middle of New York State. It was the fashion for the friends and relatives of the deceased to gather in the living room, or rather the room which was rarely lived in in the house; the neighboring families got together and the clergyman read a hymn or two and said a prayer or two and then

said what he could about the deceased; any characteristics of his that ought to be praised he praised. But this was an old curmudgeon whom nobody liked and the minister could but say a few words, and then he stopped as was the custom there and waited for the friends and relatives to get up and supplement what he had said. It was usually done by those who were there. This time no one moved, no one got up, no one said a word. The pause grew painful. At last one old farmer in a smock frock in the rear of the room got up and said, "If no one wants to say anything about this 'ere deceased I'd like to say a few words about the tariff." The discussion is in order now, gentlemen.

THE SECRETARY.—I would suggest that it would be a good plan to take up some of these subjects separately. There are twenty-six recommendations of the report of the Judicature Commission. I don't know that we can discuss them all at this meeting and it would be a good plan to take up separate subjects. One of the first subjects which is dealt with in that report is that for the creation of a Judicial Council. That recommendation was one of those which was approved by the Judiciary Committee of the Legislature. It was reported favorably by that committee by a divided vote of 8 to 7.

The subject, as already pointed out in the report of the Executive Committee, was discussed by the Executive Committee and the vote there mentioned was sent to the Judiciary Committee in support of the bill as recommended by the Commission. With the sole exception of the matter of reporting to the Governor instead of to the Legislature, the bill reported by the Judiciary Committee differs from that proposed by the Commission only in certain details as to the power to summon witnesses and the method of selecting members of the Bar and one or two other matters which the Commissioners do not seem to consider essential. The matter was referred by the House to the Ways and Means Committee and was rejected by that Committee, so that it is not now before the Legislature. At the next annual session I presume the matter may receive still further consideration if it is brought again before the Legislature, and as that is one of the most important recommendations of the Judicature Commission I think that is the best subject to take up first in this discussion. The Committee on Legislation has recommended that

the recommendation of the Commission be supported before the next legislative session.

MR. ROSENTHAL.—Mr. President, I might be interested to learn what are the objections that the Legislature made to this bill.

THE SECRETARY.—One suggestion which I heard at the time this matter was about to be heard before the Ways and Means Committee, and which I mention for the purpose of disposing of it, is that there was apparently a rumor at the State House that the Commission had spent a hundred thousand dollars. I have since heard the rumor reduced to $60,000, but even that sum seems a trifle exaggerated in view of the fact that the Legislature never appropriated more than $5,000, and that was not quite all spent. I presume the objections, so far as I have heard them expressed, were the fact that there might be some expense involved; the suggestion that it was an attempt to set up a little group to run the courts, or another commission, and the comparison of it to the Boston Finance Commission. Those are the only objections, so far as I have heard them expressed. There was not a very extended discussion before the Ways and Means Committee. There were two or three members of the Judiciary Committee who appeared in opposition and the general line of it, as I remember, was that this was unnecessary and that this commission would spend money and it was an attempt to run the judges, and other objections of that kind.

MR. JAMES E. MCCONNELL of Boston.—Mr. Chairman, I move that it be voted that the Executive Committee support this same bill before the incoming Legislature—introduce it and support it.

The motion was seconded by Mr. Lowell.

THE PRESIDENT.—In the form approved by the Commissioners, with the report to be to the Governor rather than to the Legislature?

MR. MCCONNELL.—Yes.

THE PRESIDENT.—It is moved and seconded that the Executive Committee be instructed to introduce a bill and to support it after it has been introduced, the bill to be in favor of the appointment of a commission as stated in the report, and to involve the report to the Governor, as I understand it, instead of to the Legislature.

The motion was carried, no one voting in opposition.

THE SECRETARY.—In view of the number of things that are dealt with in both reports it seems to me it would be well to take up the more important subjects rather than to follow any particular order. Next to the Judicial Council I suppose the general subject of procedure in criminal matters is the most important subject dealt with in the report. There are various recommendations in regard to that matter.

The Commission recommended, after describing the present congestion of business in the Superior Court, resulting from appeals in criminal cases and other conditions—they suggested a plan of having more jury sittings of the Superior Court, presided over by judges of the District Court in different localities, for the purpose of disposing of the criminal appeals. That plan had the advantage of not creating any additional courts, using existing judges. They also recommended the experiment in the Boston Municipal Court of having an election as to jury trial before a case was tried below, and if a man wanted a jury trial, send him directly to the Superior Court, and if he did not then claim a jury he should stand his trial and sentence in the lower court with an appeal only on sentence or law. Those recommendations perhaps might be discussed by members of the Commission themselves, two of whom are here. Mr. Green, I think might enlighten you more fully than I can on that subject.

MR. ADDISON L. GREEN of Holyoke.—The whole question of the trial of criminal cases in Massachusetts is a very serious one. How serious it was I never realized until the Commission began its work. There is opportunity to try but the merest fraction of the cases pending in this Commonwealth. District attorneys are at an absolute disadvantage in the handling of their business. They are obliged to bargain away a large amount of the business that comes before them, from mere lack of opportunity to try. That is not the complaint of the district attorneys alone; that is the agreed statement of the situation from the lips of the judges who have been holding the Superior Court. That ought not to be. A cunning criminal ought not to be in a position to drive the Commonwealth into a bargain with him.

Now, granted that the situation is that, we have not superior court judges enough to preside at courts enough for a long

enough period of time to try but a fraction of our cases, what are we going to do? One answer would be to have more superior court judges. There are objections to that. The Commission did not think it wise, after studying the matter carefully, to recommend any more superior court judges. Many suggestions were made to us. The essence of this suggestion came from a very practical judge of the Superior Court. It came from him not exactly in the form in which we made it, but the essence of it was there. He said in substance, "We have the court houses, we have the court officers, we have the district attorneys, we can get the juries; we have all the paraphernalia for trying these cases except judges. Why not create a separate court to try criminal appealed cases?" He had himself been a district attorney and a good one, and he himself recognized the disadvantages that district attorneys are under, the inability to try cases. The idea of having a separate court did not appeal to me and did not appeal to the Commission. His idea was to use the District and Police Court judges in this new court, but it does not seem to be necessary to create a new court in order to use these judges. Why not use them in trying, say, appealed cases in the Superior Court? Take them by and large through the State, they are a good body of men. They are entirely capable of dealing with such appealed criminal cases. Most of them have time to spare. I do not say that disparagingly. There are some centers like Springfield, Boston, Worcester, probably New Bedford and Fall River—I don't know—there are some centers where the judges are not only busy but overworked, but there are any number of the district courts where they have comparatively little to do. An hour or two a day of business takes care of it. Now if we could draft such judges all criminal cases could be tried. It would not be possible then for any astute lawyer in defense of his client who knew the condition of the docket, to say to the district attorney, "I demand a trial," when the last thing on earth he wants is a trial, but he demands it because he knows the district attorney cannot try his client. Every man can then have his day in court. A district attorney can try his cases, and I have a very strong guess as a lawyer of some years' trial experience myself, that when it is found out that every fellow can have his day to be tried there will be fewer

demands for trial than there are now. This was our suggestion as a way out of this difficulty. It calls for no creation of new courts; it calls for the use merely of machinery we have at present. It entails but a moderate amount of extra expense on the Commonwealth and it seems to me it would help to do away with a most intolerable evil. Whatever the expense or however we do it, it cannot be that criminals shall be able in Massachusetts, to bargain with our courts upon the question of what is to be done with them.

THE PRESIDENT.—Am I wrong in supposing as the result of having read pretty carefully the report of the Commission and still more carefully the report of the Committee, that there are very few differences between them?

THE SECRETARY.—That is true to considerable extent. The recommendations are taken up separately and are reported on in most cases by the committee. I should perhaps suggest, Mr. President, that in many ways the discussion, at a meeting of this kind of these subjects in order to get the subjects aired, is of more importance than any particular action of the meeting. I think what we want to do is to get practical suggestions and practical reactions of men on these suggestions, of the Commission, whether we take any action on behalf of the Association or not. Of course, although there are fifty or sixty practicing lawyers here, it is a comparatively small body of the members of the Association. It is the only opportunity we have, however, to have oral discussion of these subjects by members of the Association. We may get some very practical suggestions either in criticism or improvement on a particular matter, or some entirely new suggestion. Therefore I think that it is perhaps advisable to take up these subjects one after another for discussion without any formal action of the Association unless such action is suggested and the meeting wishes to take such action, in view of the fact that the time for discussion of different subjects is somewhat limited.

MR. MICHAEL A. SULLIVAN of Lawrence.—Mr. President, I have one or two suggestions which perhaps are rather interrogatories than suggestions. In the first place, I would like to ask if the bill as proposed contemplates the associate justices of the district courts as well as the regular justices hearing these cases in the Superior Court. In the second

place, whether the justices of the district courts are to preside in sittings of the Superior Courts outside of their jurisdiction. It occurs to me that the places where the congestion of cases in the Superior Court exists are likely to be the very same places where justices of the district courts have all their time taken with their present duties.

There is another thing which perhaps does not go to the root of the matter but which might be alleviative. In observing the proceedings at the current term of the Superior Court in Essex I found that the time is largely being taken up with liquor cases, while serious felonies are not disposed of. Now more than ever there are liquor cases of trivial importance which are being brought to the attention of the courts, cases, too, which in some phases are being heard also in the Federal Court. A large number of cases of illegal keeping, for instance, are brought on appeal to the Superior Court where there is not much likelihood of conviction. Most of these cases have to be tried because the statute law prescribes that they shall have priority over all except jail cases, and because the district attorney cannot dispose of them without the consent of the court. It seems to me it would help, and it would be highly desirable, if the present statutory requirement for the prior disposition of liquor cases were done away with.

Something might also be said about the recent statutory requirement regarding non-support cases. This, however, is not so important with reference to the discussion of the congestion of the courts, because there are not so many of those cases.

These remarks are made by me not as a result of any settled conviction that this action ought to be taken, but the questions have existed in my mind for some time and the suggestion of them may be of value to those who are considering these matters.

MR. GREEN.—Mr. President, no bill was introduced by the Commission in support of this recommendation. Probably the Commission had nothing over which it struggled harder than it did about this particular problem, and it was only at the end that a solution along these lines crystallized. It was too late to draft a bill and we, therefore, made a general recommendation that the justices of the district courts should

sit in these jury cases. It did not lie in our minds that the special justices would be called upon.

MR. SULLIVAN.—And whether they would sit outside the original jurisdiction or not?

MR. GREEN.—My own notion was that they would sit anywhere they were called upon to sit.

MR. WILLIAM R. SEARS of Boston.—There are one or two things I would like to ask of the commissioners or some one here who may know, and that is, in the counties where I presume the congestion is the greatest, such as Suffolk, Middlesex, Worcester and Essex, whether there are existing facilities in the way of court rooms and court officers so that other jury sessions could be held. And I would like also to know in a general way what proportion of the cases are appealed cases and cases of rather minor importance such as liquor cases or automobile cases or things of that kind, compared with indictments by the grand jury?

MR. CHARLES B. RUGG.—In Worcester County there are about four appealed cases to one indictment.

MR. W. H. WHITING.—There are plenty of court accommodations in Worcester and it might be interesting to know that just now there has been an increase of cases pending in the superior criminal docket of 25 per cent during the past year.

THE PRESIDENT.—Are there any further suggestions on this or any other subject in the report?

MR. ROBERT WALCOTT of Cambridge.—I hazard this suggestion with great diffidence because my experience is much less than that of many gentlemen present. It seems to me this recommendation is very likely the best thing that can be done in the immediate future, but it is only a palliative, after all, and there will have to be more radical treatment of criminal cases adopted sooner or later in Massachusetts. I should like to ask the gentlemen of the Commission whether it was considered, for one thing, to abandon the grand jury altogether in Massachusetts, as has been done in other states? I know a great many members of the Bar of considerable experience who think it does not justify its existence any longer because it often no longer registers an independent judgment, but usually reflects the wishes of the district attorney and that an information would be a sufficient beginning

of a criminal proceeding which has been held "due process" in case of *Hurtado* v. *California* appealed to the United States Supreme Court.* This release from his onerous duties with the Grand Jury would give the District Attorney more time for the jury trial of supposed criminals in the Superior Court.

Then if the recommendations of the Judicature Commission are adopted, namely, that a person accused of crime shall elect before trial whether or not he wishes a jury, according to the Maryland plan, undoubtedly that will greatly lessen the appeals which now choke the dockets of our criminal jury terms. In the beginning, before a man has had a judgment against him or a sentence imposed by the court, he is not so anxious to try before another tribunal as he may become afterwards in the uncertain hope of a different finding or of a lesser sentence and the certain expectation of further delay. I think the experience with civil cases in the Boston Municipal Court has convinced most of us of that.

Further, if the district attorneys, instead of doing as one or two of them have been doing, saying to the prisoner's counsel, "Of course, you understand, Mr. So and So, that I would like to try this case, but you know as well as I do that our criminal sittings are so limited that we can try only a fraction of our cases:—Under what conditions will you have your client change his plea to "Guilty?" were able to say that certain classes of offenders would be called up promptly and stiff sentences asked for, I think it would enormously limit the appeals.

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* NOTE.—The Supreme Court of the United States held in 1884 in the case of *Hurtado* v. *California*, 110 U.S. 516, 528, that Article I, Section 8, of the Constitution of the State of California, adopted in 1879, did not violate the guarantee of "due Process of law" in the Federal Constitution. The California provision provided:

"Offences heretofore required to be prosecuted by indictment shall be presented by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law."

This opinion was affirmed in 1908. *Twining* v. *State of New Jersey*, in which the following occurs in the opinion of Mr. Justice Moody:

"First: What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. . . .

" 'A process of law,' says Mr. Justice Matthews, 'which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country.' *Hurtado* v. *California*, 110 U.S. 516, 528, 1884."

Not only in California, but in many other states, prosecution *for any offence*, whether felony or misdemeanor, may be begun by information, i.e., Colorado, Missouri, Nebraska, Oregon, South Dakota, Washington, Wisconsin and Wyoming and in Indiana also an information is a sufficient beginning *for any offence except treason or murder.*

Should he take a certain class of cases,—say breaking and entering in the night-time, or assaults with dangerous weapons, and put those cases quickly through, and men charged with those crimes would very soon realize that it was no use to appeal and attempt to trade with the district attorney because of the congestion of the court docket. It seems to me that such treatment would be more fundamental than the proposal to have judges of the district courts sit with juries for the trial of criminal cases in the hope of a more prompt disposition of criminal cases.

Mr. Arthur D. Hill of Boston.—May I say one word on the suggestion made by Judge Walcott, looking to the abolition of the grand jury. That is a matter, of course, on which different people's judgment will differ. The grand jury undoubtedly wastes a good deal of the district attorney's time and undoubtedly it has the defects which everybody made up of people drawn from the community at large without regard to their training and knowledge, with respect to the subject with which they have to deal, is bound to have. Undoubtedly a very wise district attorney with a highly competent staff ought theoretically to be able to do the business better without a grand jury than with one. Nevertheless, on the whole, I believe the grand jury justifies its existence, and this on two grounds. First, because it brings into the administration of the law the co-operation of the general community, which is one of the most important things in the administration of justice. The community will always have more confidence in a system of criminal law which has in it a certain popular element than it will in one which is purely official. In the second place, it is a valuable protection to the district attorney and his staff against acquiring too purely an official point of view. It is a good thing to open the windows of your office once in a while and let the air blow in from the outside, and I think any district attorney who wants to can learn a great deal from his work with the grand jury. He can, so to speak, feel the pulse of the community in which he is working and whose sense of justice and sense of the relative seriousness of offences he ought to pay considerable attention to, from his relations with the grand jury. I know that so far as my own personal experience went during the year in which I served as district attorney in Boston, I felt that I got a great deal of benefit

from the grand jury which I worked with during the bulk of my term. I don't know whether they were an unusually good body or not; they certainly were a very sensible, level-headed set, from whom I got far more help than I did hindrance. Of course we did not always agree, but almost always we did in the end. Once or twice, when I disagreed with them, I found that they were right and I was wrong. I remember very well one case where they insisted on indicting a man where I thought the evidence did not warrant it, and they were greatly pleased when at the next meeting that we had I was able to say that the defendant had come in and pleaded guilty the day after the indictment. I should be very sorry personally to see the grand jury abolished. I would much rather see extra care given to the selection of grand jurors, because it is a very responsible office and might well, I think, be chosen with a very high degree of care to get good men and men who would represent the community as a whole. But I should see its abolition with very great regret.

THE PRESIDENT.—Does anyone wish to say anything further on the question of supporting that recommendation?

MR. WALCOTT.—If you please, Mr. President, in the Constitutional Convention the question of the abolition of the Grand Jury was considered in connection with an amendment proposed to the Massachusetts Constitution by Mr. William A. Burns, since appointed Justice of the Superior Court, to amend Article XII. of our Bill of Rights, so that the phrase "law of the land" should be freed from the restrictive interpretation given to it in 1857 by the opinion of Chief Justice Shaw in the case of *Jones* v. *Robbins*, reported in 8 Gray, 329, which was disapproved by Judge Matthews of the United States Supreme Court in the Hurtado case in 1884.*

* NOTE.—The *Jones* v. *Robbins* case held "that giving the single magistrate power to pass upon an offence without presentment by a grand jury violates the twelfth article of the Bill of Rights, because the 'law of the land' was the phrase used in Magna Charta and 'It must, therefore, have intended the ancient established law and course of legal proceedings, by an adherence to which our ancestors in England before the settlement of this country, and the emigrants themselves and their descendants, had found safety for their personal rights' quoting Lord Coke, and stating that the indictment was the only method, in his opinion, for the beginning of prosecutions for felony at the time of the settlement of this country and at the date of its independence.

As was said in the debate in the Constitutional Convention,—"notwithstanding that the United States Supreme Court has not adopted the view of the Supreme Judicial Court of our Commonwealth, the only case in which this question, so far as I can find, has come squarely before the court, was Charles Nolan's case, reported in 122 Mass. 330, in 1877, and the Massachusetts Supreme Judicial Court, in the only case subsequently on

I should like through you to ask Mr. Hill if he has ever heard of any community that has abandoned the Grand Jury in favor of initiating criminal proceedings by information of the District Attorney or other public prosecuting officers and has afterwards shown any desire to get it back again.

MR. HILL.—Mr. Walcott, I know nothing about it. I only spoke to give what evidence I could from personal experience, for whatever weight that might be entitled to. I know nothing about the results in other states and cannot give you any information.

The meeting then adjourned until 3:30 P. M.

THE LUNCHEON GIVEN BY THE NEW BEDFORD BAR ASSOCIATION.

The members met for luncheon at the Whalemen's Museum of the Old Dartmouth Historical Society at 1:30 P. M. Hon. Frank A. Milliken, President of the New Bedford Bar Association, called the meeting to order and gave an address of welcome:

Ladies and Gentlemen of the State Bar Association:

In behalf of the New Bedford Bar Association I welcome you to our city; a city of 130,000 people, 200 miles of streets for your automobiles—most of them excellent;—a city known the world over as the Whaling City because its whalers fretted the waters of every ocean. Its principal business was the whaling industry. Now its principal industry is the manufacture of fine cotton fabrics, yarns and cottons. Our mills make more than a mile a minute of the finest fabrics, and it stands the first in the world as a manufacturer of fine cotton fabrics. We are proud of our city and we have several things in the city to which I want to call your attention to prolong your stay with us, because our latchstring is out to all of you. First is the Old Colonial Courthouse on County Street, not a modern building, but all our judges unite in saying that it has one of the finest courtrooms in which to try a case in all the

the point, affirmed the majority opinion in the Jones case. So that so far as now appears, this narrower doctrine of what constitutes or can be included in the law of the land is still law in Massachusetts and there seems to be no reason to suppose that if the case came again before the Supreme Judicial Court of Massachusetts the court would reverse the decision in the Jones case approved in the Nolan case, notwithstanding that the equivalent phrase has been otherwise interpreted by the United States Supreme Court, by several Federal courts and by a number of State courts."

The proposed amendment to the State Constitution was rejected by the Convention.

Commonwealth. The eloquence of Daniel Webster has been heard there, as well as of other very eminent lawyers at the Bar.

I would call your attention also to the fact that we have a model district courthouse with as fine appointments and accommodations as any in the Commonwealth. Those two buildings are worthy of your visit. The Registry of Deeds may appeal to some of you, and then our Free Public Library, one of the first free public libraries in the United States. I believe it is the second, the first one being in Peterboro, New Hampshire. Boston claims the honor of being the first, but really it is the third. A visit to our Free Public Library will be an eye-opener to a great many of you, and I hope before your sojourn is ended you will be able to visit it. It is the stone building which you passed when you made the turn to come down to this building.

We are proud of our city and we are proud of our Bar Association. We are proud of the high personal character and professional ability of our Bar from time immemorial down to the present day. New Bedford claims a chief justice—John Mason Williams—of the old Court of Common Pleas, with his associates, Charles Henry Warren and Harrison Gray Otis Colby; likewise Lincoln Flagg Brigham, Chief Justice of the Superior Court, and his associates, Robert Carter Pitman, Lemuel LeBaron Holmes and Robert Fulton Raymond, Judge Raymond being the only one now living that hails from New Bedford. And I want to say that in our Bar we can duplicate all of those when the time comes.

We are now in the Old Dartmouth Historical Society's premises. I regret to announce that the Hon. William W. Crapo, who was to address you, is sick in bed and unable to be with us today. He is one of our first citizens, the oldest member of the Bar and one who tried cases before Chief Justice Shaw. So without further ado we will have luncheon served and after the luncheon we will have Capt. Tilton give you some information about whaling. He will tell you how the whale is caught, and most of you will want to keep your hair on when he tells you some things.

After luncheon Judge Milliken introduced Capt. James A. Tilton, a veteran commander of whaling ships, who gave an interesting address on the whale fishery.

After the address a vote of thanks was passed to Capt. Tilton, and a vote of thanks to the Old Dartmouth Historical Society for the use of their room. A group photograph was taken of the members on the deck of the model whale ship in the Museum.

THE BUSINESS MEETING CONTINUED.

The business meeting was then resumed at the New Bedford Hotel.

THE SECRETARY.—I suggest that instead of going on with the various recommendations of the Judicature Commission we should suspend that discussion a moment and discuss a question relating to the Federal Courts. I understand that the problem of dealing with liquor cases particularly has created a very serious congestion there and there is a bill before Congress for the creation of eighteen more judges to deal with business in general in the district courts—floating federal judges, so to speak. I also understand that there is a proposition which has been made to create a federal magistrate's court of some kind to deal with these cases, a series of local federal courts similar to the state system of district courts, so that these smaller cases can be dealt with by them instead of coming necessarily before a district judge. Now the United States commissioners merely have the power to hold for probable cause. They do not have power to try out and settle a case, and it was suggested that it might be well to have that subject discussed at this meeting. Judge Morton is here; he knows more about the practical situation than anybody else. Perhaps he could enlighten us on it.

THE PRESIDENT.—Judge Morton, we shall be glad to hear from you.

JUDGE MORTON.—I shall be very glad to, because I always like to have any expression of interest in the Federal Court by the Massachusetts Bar Association. Activities of the Federal Courts are usually, I think, left too much to the American Bar Association. I am very sure that the Massachusetts Bar Association could do pretty good work by sometimes taking interest in practical matters in the Federal Court in the state and considering the needs of the Federal Court. The situation under the Volstead Act in connection with other recent

acts conferring jurisdiction over what we may call minor offences has been very serious. The Federal Courts, of course, were not originally supposed to deal with that sort of question. When they were organized the theory was that they should have jurisdiction of certain matters that the United States Government retained in its control, like admiralty, like the post office, like the coinage, bankruptcy, things of that sort. Underlying all that, they were established under the United States Constitution and are occasionally called upon to settle cases of rights asserted under the Constitution. That, as it lies in my mind, was the original conception of the Federal Courts—courts administering this underlying constitutional law when called upon, which would be but seldom; courts in everyday affairs administering the subjects of jurisdiction that were reserved to the United States and courts authorized where diversity of citizenship exists to exercise general jurisdiction.

Beginning perhaps fifteen years ago, Congress put on those Courts an increasing burden of criminal jurisdiction, running down often to trivial offences, and involving often young defendants, and requiring an organization which the courts did not have. The Volstead Act has very much aggravated the situation which was beginning to develop before. I cannot tell you how many Volstead cases there are pending in this district. I do not know that I would if I could, because it might not be wise; but I can assure you that the number is extremely large.

I do not think that the solution of the problem is in the creation of additional district judges. In the first place, you would have to have too many of them. In the next place, I do not think that Federal judges ought to be appointed to try rum cases and petty offences. That is not my conception, at least, of the position. Those petty offences, involving fines of from $50 to $100 or $250, or imprisonment for a few months, are magistrates' court business, and they all, I think, ought to be settled by magistrates' courts held locally. I had a case yesterday, a very trivial case, originating up in Pittsfield, where the defendant had to come down from Pittsfield to Boston. The case could not come up and be disposed of yesterday and he had to go back to Pittsfield, and he will have to travel at least twice and probably three times from Pitts-

field to Boston at his own expense on a case where the upshot of it will be, if he is convicted, a fine of $50. I think those cases ought to be tried near the man. He may owe $50—he does not owe $50 or $60 more in traveling expenses as a penalty, to be put upon him whether he is guilty or innocent, to come down to Boston. So it has been suggested that the existing United States Commissioners should when necessary be authorized by the district judge to act as trial commissioners and given jurisdiction under certain designated acts —the Volstead Act, the Interstate Larceny Act, and one or two other acts of that character which create petty offences; that these commissioners should be given jurisdiction under these acts with power to hear and sentence under them. The defendants should have the same right of appeal as is now given from a state district court to the Superior Court. And in addition, in order to harmonize the disposition of the cases throughout the district, either the government or the defendant is in the proposed draft given the right of appeal on the question of sentence. I thing that a valuable feature, especially as it concerns the government, because it will tend to equalize the treatment of what is about the same offence in Berkshire and Worcester and Boston and down here in New Bedford. That proposition has not as yet, I think, reached Congress. It is under advisement in the Executive Department, perhaps, or Administrative Department—I am not just sure where it is. But I would like very much to have the matter discussed at the meeting if it is thought wise to do so, and if anyone can suggest the right solution it might be helpful to go on record to that effect.

THE SECRETARY.—I suggest, Mr. Chairman, that this matter is perhaps one which might well be referred to the Executive Committee for consideration. Some account of the discussion of the subject can be printed in the report of this meeting in order to bring it before the Association as a whole.

MR. JAMES M. ROSENTHAL.—Mr. President, there is one thing that has been in my mind since the Volstead Act was passed, about the possibility—I presume it would require Federal legislation—of giving state courts concurrent action with federal courts in the enforcement of this type of federal criminal legislation. Judge Morton has spoken of the difficulties of a man from Pittsfield being brought down to Boston

and suggested as an alternative that he be tried before the United States Commissioner. Well, for one thing, there is only one United States Commissioner for Berkshire County, which is fifty miles north and south. It would require considerable expense to bring a man from North Adams to Pittsfield or from Great Barrington to Pittsfield. Another thing: The compensation of the United States Commissioner is practically entirely a matter of fees. I don't think that type of case should be left with a man who relies on his fees. If we put him on a salary basis there is the same objection to that that there is to the increase of federal judges, namely, that it is a largely increased expense. While it is true that there is a large congestion in the local courts, you will not find that in the western counties. Furthermore, you will find them more vigilant, because the local police and state police are far more apt to work in harmony with a local court judge than they are with a United States Commissioner. If there are no constitutional objections in the way, I should suggest that it would be well worth while to investigate the possibilities of clearing up these federal dockets and giving the district courts concurrent jurisdiction. The state courts today have concurrent jurisdiction in the matter of naturalization. They have concurrent jurisdiction in the matter of the Federal Employers' Liability Act. Why couldn't they have concurrent jurisdiction in this type of petty criminal offence?

THE PRESIDENT.—The Chair will entertain a motion.

THE SECRETARY.—Might it be put, Mr. President, in this way: That the Executive Committee be requested to consider some feasible plan for the consideration of these minor federal offences by local tribunals, without attempting to specify the form or character of the local tribunal, and then the suggestions that have been made at this meeting, together with any other suggestions which may perhaps be made before we get through with the subject, will be taken into consideration by the Executive Committee? I think that Committee would be very glad to have any other practical reactions of any members here on this subject, because, as Judge Morton says, it is of the same character as the problems considered by the Judicature Commission, except that it applies to the federal courts, which are quite as congested, I understand, as the state courts.

THE PRESIDENT.—Will you word your motion again, Mr. Grinnell?

THE SECRETARY.—That the Executive Committee be requested to consider some feasible method for the hearing and deciding of minor criminal cases under federal law by local tribunals, either state or federal.

MR. LOWELL.—Mr. President, there is one thing that occurs to me on that matter. I had occasion in revising the statutes to look into the Eighteenth Amendment a little and the decision of the Supreme Court and of our Supreme Judicial Court. As I remember the amendment, the state has concurrent power with the Congress to pass legislation. It is perfectly competent for our Legislature to pass some kind of legislation giving means for enforcing the federal law. So I should think, as far as the liquor traffic goes, that would be one way of getting at it. I am afraid if we get too much of the liquor idea in our heads we will not accomplish what his Honor wants. As I understand it, there are several matters, one of them relating to the Volstead Act and other matters relating to minor criminal offences. Now it so happens that as to the Volstead Act I think you could have local state tribunals take care of it, but I don't suppose you could with the others, so that would hardly accomplish what his Honor wants. In considering the thing it would perhaps be better to put it in the form of arriving at a means of taking away from the federal judges things which now take too much of their time and with which they should not be burdened, rather than laying too much emphasis on local tribunals.

THE PRESIDENT.—Do you understand the amendment, Mr. Grinnell?

THE SECRETARY.—Yes, I think I would accept the amendment of Mr. Lowell in this form: "consider what feasible method there may be for relieving the federal judges from the present congestion of minor criminal business."

The motion was carried.

THE SECRETARY.—We had been discussing the subject of criminal procedure this morning. Another important recommendation in the report of the commission was the bill relative to civil appeals from district courts, the subject of which was to extend the plan that has been in operation for about eight years in the Boston Municipal Court to the other district

courts of the state; to provide that the civil cases shall be heard finally by the district court unless they are removed to the Superior Court, and to provide appellate divisions in three sections of the state to hear appeals on questions of law, with the further appeal to the Supreme Court. The details of that bill were worked out in the draft submitted by the commission, and in that draft was also included a section to provide for an administrative committee of the district court judges throughout the state, consisting of the three presiding judges in the three sections of the state in which these appellate divisions were created, the members of that appellate division being appointed from time to time by the Chief Justice of the Supreme Judicial Court. This plan, if I remember correctly, both for doing away with double trials on the facts, creating these appellate divisions and creating this administrative committee, so-called, had the approval of the association of justices of the district courts at a meeting last winter, at which it was quite fully discussed after being considered by a committee of that organization. The point of the bill is that the whole plan of double trials on the facts, which originally existed in all the courts of the Commonwealth, including the Supreme Court, has been gradually abandoned, first in the Supreme Court and then in the other courts, the Superior Court succeeding to a large amount of the original trial work of the Supreme Court. It was abandoned in the Land Court in 1910 after the recommendation of the commission that year. It was abandoned in the Probate Court by the act of 1919 and the commission recommended that the sooner it was abandoned in the District Courts and a feasible plan adopted for dealing with the situation and reducing the unnecessary double trials on the facts, the better. The bill as reported by the commission is substantially, with certain modifications and additions, the bill that has been supported from time to time by this Association during the past six or eight years and by a number of members of the Bar from different parts of the state. There may be some questions or suggestions which members have in regard to that matter. Of course the more business that can be disposed of in the district courts, the more effectively your system is working.

I should speak in explanation of one feature of it that has caused some discussion in the past — and that is the

question of the conditions under which removal is allowed by the defendant. In the Boston courts the defendant has a right of removal to the Superior Court by claiming a jury trial, and filing a removal bond of $100, with the power of the court to exempt any defendant for cause shown from the filing of that bond. As matter of fact, I understand during the eight years that the act has been in operation there have not been more than two or three or some very small number like that of applications to be exempted from the removal bond. The commission reporting this bill to extend this plan included a provision for a similar removal bond, but also recommended that the plan was worth trying without the removal bond. That recommendation was made because of the fact that at some of the discussions during the past few years the requirement of a bond had caused a good deal of criticism from men from other counties. There is no reason whatever why the requirement of a removal bond cannot be omitted. In fact, the words which require it are bracketed in the report of the commission, so that they can be stricken out without recasting the act in any way.

Perhaps in this connection the other subject relating to the jurisdiction of the district courts might be mentioned, which is dealt with by the commission, and that is the question of the removal of the jurisdictional limit, which is now $2000 in the Boston court and $1000 in the other district courts of the state. The commission in its report stated that they saw no sufficient reason for the continuance of those jurisdictional limits, and they reported an act which would make it possible for a man to bring suit in any district court on a claim involving any amount, with a right on the part of the defendant to remove the case to the Superior Court without bond in any case exceeding in amount the present jurisdiction of the District Court. The conditions of such removal were practically identical with the provisions for removal in equity cases from the Superior Court to the Supreme Court which have existed ever since 1883, when the Superior Court was first given jurisdiction in equity; that is, that an affidavit should be filed that there was an issue to decide and — in that case it had to involve more than $4000, in this case it would simply be that the case involved more than the present jurisdiction of

the court in which the case was brought, that being $2000 in the Boston Central Court and $1000 outside.

The reasons in the report of the Commission, which are also approved in the report of the majority at least of the Committee on Legislation, are that if both parties are satisfied to try a case of $5000 or $50,000 before a District Court, which is less expensive for the parties and the Commonwealth than a similar trial in the Superior Court, there is no reason why the Commonwealth should prevent them from trying it in that court. The free provision for removal fully protects the defendant and the right to bring his suit in the Superior Court originally fully protects the plaintiff if he wants to have ultimately a trial in the Superior Court; and if the parties do not want to have it there is no reason why they should be forced into it at the greater expense of everybody.

MR. ROSENTHAL.—As a member of the Legislative Committee at the time when this report was filed I took the liberty of writing my views concerning the propositions, and this was one of them in which I differed from the majority of the Committee in regard to the matter of jurisdictional limits. The Judicature Commission's proposal, which appears on page 141 of the special number of the Massachusetts Law Quarterly, January, 1921, the proposal numbered 6, starts off with a provision that —

> "District courts shall have original jurisdiction concurrent with the Superior Court of actions of contract, tort or replevin, and also of actions of summary process under Chapter 239, and proceedings under Section 41 of Chapter 231."

To that I have no objection. I do not see, as the Secretary explained, if both parties desire to try a case involving a larger amount in the District Court, why anyone should object. And if that were worded, "Where the parties by mutual consent desire to have it tried there," I would be very much in favor of it.

THE PRESIDENT.—Why haven't they mutually consented where one man has brought the suit there and the other man, having the right of removal, has left it there?

MR. ROSENTHAL.—Before the defendant has the right of

removal under this act he must file an affidavit of merits and also pay an entry fee of three dollars. Now while it might be right and proper to require a defendant to file an affidavit of merits if it were required of the plaintiff, yet so long as it is not required of the plaintiff in the Superior Court today but any man can bring an action without an affidavit of merits and get a jury trial, I do not see why it should be required of the defendant. And I certainly do not see why a defendant should have to pay a fine of three dollars in order to get the jury trial which is given him by the Constitution.

THE SECRETARY.—If the plaintiff sues in the Superior Court and wants to have a trial there originally, asks for process in that court, he has to pay his entry fee. Is it unreasonable that the party who wants to have that court consider his case should pay the entry fee in that court?

MR. ROSENTHAL.—My objection would be this: That here the plaintiff can get out of paying that entry fee today by merely the process of entering his case in the District Court, which is not fair.

THE SECRETARY.—But he does not get out of it except for the reason that he is satisfied to try the case below.

MR. ROSENTHAL.—Why, no.

THE SECRETARY.—And if he wants to start his case in the Superior Court he pays his entry fee.

MR. ROSENTHAL.—Yes.

THE SECRETARY.—So that I do not see that it is unreasonable for the man who invokes the jurisdiction of the Superior Court to pay the entry fee required for that proceeding. As to the affidavit of merits, there again the affidavit is the same sort of affidavit as is required for removal from the Superior Court —

> "of his belief that the matter involved in the suit exceeds" so many "dollars in value, . . . that his interest alone or with the interest of any other defendant having a joint or common interest with him exceeds that value, that he has a substantial defense, which shall be specified in such affidavit, that he intends to bring the cause to a hearing," . . .

Now if he is not ready to make an affidavit that he has a substantial defense, that he really intends to try and that the

amount involved exceeds the present jurisdiction of the District Court or Municipal Court, why should he be allowed to carry the case up into the court which is more expensive for the public and the parties?

MR. ROSENTHAL.—My objection is, for the plaintiff originally to get his jury trial if he wants it he is not obliged to file an affidavit that he has a cause of action, and so long as he is not obliged to file that affidavit I don't see why the defendant should have to file an affidavit that he has a defense.

MR. HOMANS.—The plaintiff has to state a case, Mr. President.

THE PRESIDENT.—He has to state a case.

MR. ROSENTHAL.—Well, he has to state a case just as the defendant puts in a general denial, no more nor less.

MR. HOMANS.—He goes further than that.

THE SECRETARY.—He has to file something more than the defendant has to file. In fact, one of the difficulties of the whole mode of procedure today is the lack of any specifications in pleadings that amount to anything in many cases. One of the problems that exists now, as it always has existed, is to find some feasible method of trying to define issues. A considerable portion of the discussion in the report of the Commissioners is directed toward that problem of defining issues. The requirement in the case of a removal of this kind from a lower to a higher court seems to be a reasonable point at which to call for some more definite statement of issues than is involved in a general denial. I think that was the view of the Commissioners.

MR. NUTTER.—I think I might add this: It is really analogous to an affidavit of no defense. Of course if a plaintiff begins in the Superior Court he can at some stage of the proceedings file an affidavit of no defense, and the defendant is compelled to file a counter-affidavit, and if he cannot file a counter-affidavit the plaintiff gets a speedy judgment. Now the plaintiff begins in the lower court; if the defendant wants to get in the upper court he has to file an affidavit which is practically equivalent to an affidavit of no defense. As to the three-dollar fee, of course that is not enough to quarrel about; one could leave that out. But the object of this, the whole object was to allow the plaintiff to proceed as rapidly as possible to get judgment against a defendant

who had no defense, who knew he had no defense, everybody else knew he had no defense, but it is impossible, owing to the very dilatory system that prevails in Massachusetts, for the plaintiff to get his rights for an indefinite time.

MR. FORBUSH.—So far as the three-dollar proposition is concerned, it appears to simmer down to this: If the plaintiff wants a jury trial he enters the case in the Superior Court and pays three dollars. If the defendant wants a jury trial and the case has been entered in the lower court he has to pay three dollars to get his jury trial. It seems to me that is the thing reduced to its lowest terms.

THE PRESIDENT.—Are there any further remarks on that provision? Supposing we pass to the next, as the afternoon is moving.

THE SECRETARY.—"Declaratory Judgments," "Discovery of Documents," "Oral Examination of Parties before Trial," "Equitable Process after Judgment," and "Jurisdiction and Powers of Justices of the Supreme Judicial Court and Superior Court."

There is one more matter relating to the District Courts, which I overlooked, and that is the matter of "Conflicts of Jurisdiction as to Domestic Relations." I think very likely you are all familiar with the situation.

THE PRESIDENT.—And I think anyone would try and remedy it, would they not? It is a thing that ought to be remedied and everybody would agree ought to be remedied.

THE SECRETARY.—It is merely a matter of practical measures thus suggested for dealing with them. The matter of declaratory judgment is a plan which has been discussed all over the country and the suggestion here is adding this subject to the equitable jurisdiction of the court. We are familiar with the subject in the Land Court and instructions to trustees and in various other proceedings under different names. The suggestion here is to extend it as a practicable method of settling controversies which has worked in other places. There seems to be no particular reason why we should not be able to make it work.

The suggestions in regard to jurisdiction and powers of the justices of the Supreme Court and the Superior Court are contained in three separate acts; one to extend the concurrent jurisdiction of the Superior Court to cover all the pre-

rogative writs except those in the nature of appeal. Another bill is to provide that the judges of the Supreme Court shall have all the powers of the judges of the Superior Court and be enabled to act as if they were judges of the Superior Court, thus bringing the courts somewhat closer together and, as suggested in the report of the Committee on Legislation, enabling Judge Crosby when he is in Pittsfield to issue an order of notice returnable in the Superior Court or some other process of that kind, so that it may not be necessary for counsel in Pittsfield to travel to Springfield to get at a judge. There seems to be no reason why the judges of the Supreme Court should not have the powers of judges of the Superior Court, so that they could use them if they found it expedient. It seems to make the system more adaptable to the work which is to be done. As the Committee on Legislation suggests, it is not expected that the judges of the Supreme Court are going to march into the Superior Court and try cases all the time; they have too many other things to do. But it might be very useful and valuable for everyone that they should have these mutual powers. The other suggestion contained in the same act, being that if necessary in order to expedite business or for special reasons in the Supreme Court, a judge of the Superior Court could be called in by the Chief Justice of the Supreme Court after conference with the Chief Justice of the Superior Court to sit as single justice and hear matters in equity or in prerogative writs pending before the Supreme Court, seems equally desirable.

The matter of discovery of documents is a suggestion that an affidavit of all relevant documents could be called for, similar to the affidavits required in some other jurisdictions, and then the documents therein specified should be produced under orders of the court under the direction of the court for inspection, and the proposal for oral examination of parties before trial, is an extension of the idea of discovery along the lines of the New Hampshire and Wisconsin statutes which enable parties to take the oral depositions of the other party in advance of trial without the restrictions of depositions that we have here in Massachusetts. It gives an opportunity for oral examination instead of the complicated and difficult process of discovery by interrogatories. In New Hampshire they go further and provide that the deposition of any wit-

ness can be taken and used, without the restrictions that we have here in Massachusetts, unless the witness is present at the trial, and then he can be called. The conditions under which the deposition is taken in Massachusetts, for instance, do not have to continue at the time of the trial in order to enable the use of the deposition.

All those recommendations of the Commission are made in line with the plan already spoken of, of defining issues in advance of trial so far as practicable, in order to avoid trial on unnecessary issues and undisputed issues.

THE PRESIDENT.—One more that you have not spoken of, and that is "Equitable Process after Judgment."

THE SECRETARY.—The equitable process after judgment is a suggestion that, particularly on claims for necessaries or labor, the procedure of the district courts should be simplified and made more direct.

THE PRESIDENT.—There are, Mr. Grinnell, no criticisms on these five?

THE SECRETARY.—Well, I am not so sure about that, Mr. President. I think there may be, although some of the members may be somewhat modest in their expression. There are practical legislators and lawyers here who know as much as I do about it.

THE PRESIDENT.—I will interrupt the proceedings so far as to say that we have been very pleasantly entertained in New Bedford; we have enjoyed the hospitality of the New Bedford Bar Association and they have given us a most excellent lunch and a very pleasant chance to visit the Museum, and it seems to me that it would be but right for us to pass a vote expressing our gratitude for their treatment of us and that a copy of the vote should be sent to the president of the New Bedford Bar Association.

The motion was made and carried unanimously.

THE PRESIDENT.—Now we will go back to the other matters.

MR. SULLIVAN of Lawrence.—Mr. President, if I may interrupt—

THE PRESIDENT.—Certainly.

MR. SULLIVAN.—I would like to have incorporated in that motion a letter from Mr. Grinnell on behalf of the Massachusetts Bar Association to the directors of the Old Dartmouth Historical Society for their courtesy.

The suggestion was agreed to.

MR. ADDISON L. GREEN.—There is lurking underneath these proposals a very practical suggestion, and it seems to me there are enough lawyers here, practical triers of cases, to shed light on it. The object of the recommendations is really to define issues, which means to compel parties in a measure to disclose their cases. I am going to confess that in the early days when I started practice lawyers didn't try cases that way. We didn't show the fellow on the other side anything we didn't have to. We got all we could get and kept all we got. I am free to confess as a member of the Commission that when I approached these problems I approached them in that spirit. But I became convinced, as I suppose many of us get convinced as the years go on, that after all there is something bigger and broader in the trial of a case than playing one's trumps a little more skilfully than the other fellow plays his. That is the issue here. How far are we as lawyers, practical trial lawyers, prepared to throw our influence in the way of legislation that will define issues? For instance, suit is brought on a promissory note. Either the defendant owes it or he has some definite defense, he has paid it or it is outlawed or something similar. Ought the defendant to deny signatures, file a general denial, set up payment and every other possible defense and thus compel the adverse party to prepare to meet them? Is there any reason why the real issue should not be immediately defined? That is where the English are superior to us in the trial of cases. They try the thing that is in dispute. Sometimes we try everything but the thing that is in dispute. It is, therefore, proposed that we define issues in advance of trial or it is proposed that the parties go before a judge or a commissioner and the plaintiff is to say, "That is the thing I claim;" the defendant is to say, "That is the thing I dispute."

In addition, can we not provide some method of taking the oral depositions of parties in advance of trial, and thereby simplify and shorten the case? You see this is altogether an effort to reach the basic fact or facts in dispute in a case and to find a business-like way of trying it. There is a feeling among laymen today that a lot of time is wasted in the law courts. I think much of it is unjust, but I cannot say that

all of it is unjust, and so far as it is just we as lawyers ought to provide a remedy.

Now, how far do these recommendations meet the approval of the members of the Bar? It is very well represented here tonight. It is a good opportunity to get at what our Secretary calls their "mental reactions."

JUDGE MORTON.—I will make another suggestion. When you look at the average lawsuit and consider the time between the time of the beginning of it and the time of settling it, you will find that 50 per cent of the time in a case involving a substantial amount has elapsed between the verdict and the final judgment. In other words, I think I am well within bounds when I say that 50 per cent of the "law's delay" is caused by appellate proceedings.

Now in my day — of course I have lost touch with the state docket, but in my day it was perfectly possible in Bristol County to try a jury case just as soon as it ought to be tried if you followed it up personally. What happened then? The party that was beaten had the burden of carrying forward the appeal. Was he keen about it? Of course not. Did he hurry it forward? Certainly he did not. He delayed until the man on the other side jacked him up and finally the judge and the other man would jack him up and the bills of exceptions were filed and the case would be argued on the appeal.

Now it seems to me that if we are really in earnest about this thing, where we want to start in is from that end of it. Just for the sake of discussion, my own view, which is very clear and strong — I will admit it is — is that as a country we are greatly overdoing the appellate business. I sit occasionally as an appellate judge; I sit most of my time as *nisi prius* judge and I see both sides of the matter. Would it not be a great and advantageous change if we said that the verdict was the final word, if we abolished all right of appeal, if we put all appeals beyond the Superior Court on the same basis that *certiorari* is now put on from the United States Supreme Court to the Courts of Appeals? In other words, a man loses in the Superior Court; then let the losing party have the right to go to the Supreme Court just as you can go to the Supreme Court now in Washington to say that your case has been erroneously dealt with, not in some little way, but that fundamentally you have not had justice. *Ex parte* you can do that.

If you make out an *ex parte* showing, let the Supreme Court order the case up. You must do that within thirty days, and then within thirty days after your verdict, if the *certiorari* has not been granted your verdict stands. That would be my view of the place to save time in cases. When it comes to the trial of cases — well, I tried them a good many years ago and perhaps am rather hard-shelled.

Mr. James E. McConnell of Boston.—I want to throw a few suggestions into the limelight here. Following Judge Morton's remarks, I think in Boston at least there is one delay on the part of business men trying to obtain justice that causes more trouble than anything else, and that is in trying to bring suits on long accounts involving their business relations with some other litigant. These cases always must go to an auditor. Under our present system of auditors time is wasted in trying to agree upon the dates for hearings. One man is tired, one man has got something else to do; it runs along a long while, waiting for auditors' reports. The result is that many associations in Boston, like the cotton and other commercial boards, have their own boards of arbitration rather than go to the courts. A thought was suggested to me by Judge Sanderson which came to him from Moorfield Storey. It struck me as a good idea. In order to do away with the present system of masters and auditors, which causes long delay, but to whom cases must be sent where a jury trial is involved in order to avoid a long hearing in the court, it was suggested that a master's court be established, with masters appointed by the governor, similar to judges. When a jury trial is claimed and where it is asked that the case be sent to an auditor, and now it cannot be sent to one of the judges but must be sent to an auditor or a master, have auditors and masters appointed either by the governor or by the courts and a master's court held where you can have those trials continuously, where you can have men of calibre, equal or nearly equal to judges, on a regular salary, instead of sitting at $25 a day, for which a man cannot give his time when he has more important engagements. Under this plan, with a master's court holding continuous sessions, cases sent to it would receive speedy action. That was Mr. Storey's suggestion to Judge Sanderson, and Judge Sanderson, when I was before him in regard to appointing an auditor, talked

that matter over with me and I felt it was a wise solution of the difficulty today in masters' and auditors' cases.

MR. SULLIVAN.—On any of the matters that have been discussed here there has not been a great deal of discussion, and it seems to me the reason there has not been is that there is not very much difference of opinion, as the President suggested, among us here about the advisability of these matters. The trouble is, whatever we say here is a sort of academic discussion; and these are practical questions. For instance, the measure before us which would have most practical effect in decreasing the congestion of the courts, namely, the adoption of the Boston Municipal Court system by the District Courts, has had practically the unanimous support of this Association for six or eight years, and yet it has not been adopted by the Legislature. This body, I think, has voted on it several times; it surely has discussed it several times and with much unanimity. It is apparent that the ideas of this Association are not being carried into practical effect, and it seems to me that we ought not to be discussing so much the advisability of these matters as perhaps the question why they have not been adopted, and see if some practical means for getting them adopted should not be adopted by this Association. The question of how to put them into effect is now becoming important, rather than the discussion of whether they are or are not advisable. In connection with that a beginning might be made by some of those who have appeared before the legislative committees, and who could suggest to us what objections have been made by those who have opposed them, and perhaps give us the reasons why the Legislature has not adopted what seem to be approved by the unanimous opinion of this Association.

MR. MITCHELL.—Mr. President, I am entirely in accord with the recommendations that are before us. A suggestion has occurred to me — I don't know whether there is anything in it or not, but there is one proposal that the Chief Justice of the Supreme Judicial Court shall have the power to call in a Justice of the Superior Court to sit in the Supreme Court. As I understand it, the Supreme Court is a constitutional court, established by the Constitution. All other courts are statutory courts. The question is this: The justices of the Supreme Court get their jurisdiction by virtue of the Con-

stitution. Has the Legislature power to say that any other judge can exercise the functions of a judge of the Supreme Court who gets his power by virtue of the Constitution and not by virtue of any statute?

THE SECRETARY.—I think perhaps I can answer that question so far as the Commission has dealt with it in their report. It was thought that that question might arise if it were proposed that a judge of the Superior Court might be called in to sit with the full bench on appellate matters as a court of last resort; but so far as the calling in of a Superior Court judge to sit as a single justice was concerned, the Legislature had the power of regulating and adding to or taking away the jurisdiction of various courts, as they have exercised that power from time to time in transferring jurisdiction from one to another, and that as a matter of fact a Superior Court judge thus called in to sit as a single justice in the Supreme Court would be simply exercising functions in one courtroom in the courthouse which he already has or might be given authority to exercise in another courtroom in the courthouse called the Superior Court. So the Commissioners felt, so far as sitting as single justices is concerned, there was no constitutional difficulty and it might arise only if it were suggested that Superior Court judges should be called in to sit with the full court on appeals.

Answering Mr. Sullivan's question as to why the District Court of Appeals bill has not been adopted hitherto, so far as my connection with that bill has been concerned, as I have appeared several times before the Judiciary Committee, the reasons that I have heard expressed before the committee have been various, such as an objection to a requirement of a bond, which, as I have already explained, could easily be eliminated; the varying amount of distrust of different district court judges or special justices in different parts of the State; a certain amount of prejudice against the plan in the Boston court and the idea of not having free appeal on the facts and a certain amount of natural conservative inertia which is peculiarly characteristic of the bar that does not like to change things. That has always been very strong and still is. The Commission in discussing these various subjects has expressed its feeling that in spite of whatever criticisms are made of the District Courts and some of the judges in differ-

ent parts of the State, there being a very considerable number of them, the Commonwealth has been receiving good service from the District Courts and that they are capable of rendering a great deal more service if we put more responsibility on them, and that the plan of placing more responsibility on the District Courts, giving them more opportunity to use the judicial power which they have or might have, will gradually develop the existing men, bringing out the best work that they are capable of, and will have an effect in gradually improving the appointments to those courts all along the line. There is now a very considerable waste of judicial power as well as of money involved in the administration of the courts in the present system which involves a duplication of function. I think those are the two sides of the thing as I have seen them expressed before the Legislature.

MR. WILLIAM A. DAVENPORT of Greenfield.—Mr. President, I didn't intend to say anything. My recollection about this proposed bill relative to the District Courts is that it eliminates appeal except on questions of law. Am I right or wrong?

THE PRESIDENT.—I think you are right.

MR. DAVENPORT.—That being the case, you are relying upon the human element altogether, and that is just the difficulty in life and in the practice of law. If the human was infallible we would not need any appeals, but that is not the case. It does not make any difference how good the judge is, he is liable to err, and if he errs the party should not be obliged to lose by it; he ought to have his right of appeal. So I should oppose and shall always oppose any procedure which attempts to curb the right of appeal of a party from a district court or from a superior court.

THE PRESIDENT.—That is, from a single mind.

MR. DAVENPORT.—From a single justice.

THE PRESIDENT.—Yes.

MR. DAVENPORT.—I have been in practice twenty-five years and I have tried in all courts, State and United States, and I find the human element comes into it all the time. The best illustration I have of the situation was sprung by the presiding justice of the Circuit Court of Appeals a few years ago, when one of the noted Boston attorneys wound up his brief by saying that the decision of a justice of the District Court

of the United States who had spent so many years as judge of that court and had spent his entire life in the study and practice of a certain branch of law ought not to be lightly set aside. The presiding justice told the gentleman that he has been practicing, to his personal knowledge, forty years before that court, and that the Circuit Court of Appeals was established for the purpose of correcting errors of the lower courts, and if error existed it would be corrected. That is the whole thing in any court; if error exists it ought to be corrected. Some one, I don't know who it is, because I have not had the time to look it up, fixed it so that you could not appeal from a decision of the judge of the Probate Court except on questions of law and on his report, a most unjust law, a most unjust thing for the parties interested.

Lawyers as a general proposition know pretty well whether their clients' interests are being taken care of by the court or whether they are being sacrificed, and when a lawyer feels that the interests of his clients are being sacrificed either by a charge to the jury or by the case being decided erroneously on facts by the court, his client ought to have a right of appeal. So far as this district court proceeding is concerned, it never ought to become law. As a general proposition things run along pretty well. I have a general notion that it is mostly theorists who are working on this proposition, not men who are practicing law all the time.

I don't think of anything more that I can say, except that I oppose any more of those proceedings which will curtail the right of a party to appeal. It is not a question of a lawyer, it is not a question of expense; it is a question of right and wrong. And we ought not as a Bar Association to undertake to say to litigants, "You shall not have a right of appeal."

Mr. William G. McKechnie of Springfield.—Along the line of brother Davenport's remarks, in Springfield we have three excellent judges in our District Court — Judge Heady, Judge Malley and Judge Lyford, all of them extremely conscientious, possessing the absolute confidence of the bar and all of them first-rate lawyers. Their decisions of law are generally satisfactory. I will venture to say that less than ten per cent of the cases entered in our District Court are appealed, and these cases are appealed generally on questions

of fact where the lawyers and clients are dissatisfied with the court's decision of fact but not with the application of the law. It might be, however, that such a law would result in great improvement in the decisions of the district judges, as they would dislike very much to be overruled by a court established from their own body. I do not believe that the application of the law, however, would work as harmoniously in western Massachusetts as it would work, for example, in a big city like Boston. I am not very emphatic in opposing an experiment of this kind and would not go so far as to offer opposition to the passage of the proposed law.

The meeting then adjourned at 5.45 P. M.

F. W. GRINNELL,
Secretary.

ADDRESSES AT THE DINNER

THE PRESIDENT.—There is in the northern part of Ohio a tract of land representing three or four counties which used to be called the Western Reserve. In the center of that tract is the city of Cleveland. The tract was settled in the latter part of the eighteenth century by settlers from Connecticut and Western Massachusetts, and there ought to be a warm spot in the heart of every New Englander for anyone who comes from that section. For 130 or 140 years they have had their civic governments, their courts, and they have been held up as a model to the United States for what they have done and what they have accomplished.

Two or three years ago there seemed to be a wrench that had been thrown into that machinery. The courts did not seem to function and the civic government was weak and ineffective. But with that same feeling of pride in their country and pride in their city they adopted a novel way of dealing with the matter. They established with the financial assistance of the Cleveland Foundation a survey. That is, they organized committees to look the matter over, see where the fault was and devise methods of improvement. Wisely, they took their advisers from among persons outside their own city or their own country. They went to Roscoe Pound of Harvard Law School and Prof. Frankfurter and made them their advisory committee. Each one of the investigating

committees — and there were half a dozen of them — having to do each with its own branch, were selected from outside the state, and Messrs. Reginald H. Smith and Herbert B. Ehrmann were selected from the Boston lawyers as the ones to deal with what perhaps was the worst question that they had to deal with, namely, the criminal courts and the failure of justice in those courts. The citizens of Cleveland also took part in this and an advisory committee was formed to help in the investigation and dealing with the matter. They needed a man at their head who was fearless, bold, a man of marked position as a lawyer and a man who was assiduous, was really insistent on having his way. They selected as the chairman of that committee the guest whom we have invited here to address us on that subject. We ought to have a warm spot in our hearts for him, for he is practically one of us. He was born in Newburyport, he was graduated at Williams College and his sons are now there. I think we ought to give him a warm welcome. I introduce to you Mr. Amos Burt Thompson of the Cleveland Bar.

ADDRESS OF AMOS BURT THOMPSON, ESQ.

Mr. President, Ladies and Gentlemen of the Massachusetts Bar:

The remarks of your president indicate that I am the only subject concerning which he is misinformed. They say that a lie travels faster than the truth. I hope when the truth strikes Boston and it goes through the crooked streets of that city to that lovely home on Beacon Street, that it will become so distorted that your president will really never know how unworthy I am of the kind remarks he has made in introducing me.

He has referred to my birth in this State and my education. I cannot speak of it without feeling, because my mother and father and I spent many very happy years in this State. I am passionately fond of Massachusetts. Although I have lived forty years in Ohio, and Ohio has been good to me, I often think when I pass through the western part of this State, to which I am particularly devoted, of that sentence which I probably misquote when I say: "God's fingers touched but did not press when they made this country." It is a

peculiar pleasure to come here and mix with you, to listen to your talks today. I think I understand a little better, Mr. President, now that I know some of the Massachusetts Bar, why it is when we seek a precedent we have always rushed to Massachusetts cases.

Your Secretary, when he wrote me, said I could talk as long as I wanted to. If I applied a literal construction to that I would have come and sat still and listened to you. I don't know whether your Statute of 1656 is still in force or whether it does not apply to non-residents. I refer to the one that fined any lawyer twenty shillings who talks more than an hour. I have my watch before me and I shall not run the risk of violating it.

Before I say anything in reference to the Cleveland Survey, which I am here to discuss, I wish it understood that I am proud of the city and proud of the bar. Things have occurred there of which I am ashamed. But it would convey quite a wrong impression if I came here to discuss Cleveland as a wicked city. It was kind of Dean Pound when he was there to say that the people of Cleveland demonstrated their merit in that it was the only American city which had ever asked anyone to come and survey it. You may get a better picture of conditions there and a better picture of the reasons for the survey and what it has attempted to do if I refer to the causes that led up to it.

Carrying your mind back to the years 1916 and 1917, there was in Cleveland, as I fancy in other cities, a let-down in the moral tone. Cleveland, I think, is as good a city as there is in the country when you consider its size and its rapid growth, when you consider its heterogeneous population, and particularly when you consider that we have not what you are favored with—we have not appointed judges; we have the elective system. During 1916, '17, and '18 there was a prosecuting attorney in our city who, by reason of some things that he did and had not done, was under suspicion. In December, 1918, the attention of the Bar Association was called to this subject as the result of a statement made at one of our meetings to the effect that the prosecuting attorney and his office were under suspicion. This resulted in the appointment of a committee to investigate. I would like to read two or three sentences from the report of that committee.

It was a courageous report and a situation that was difficult to handle.

The report opened by stating that it had been publicly stated at the December meeting of the Cleveland Bar Association that the administration of justice in the criminal courts in Cuyahoga County was under suspicion. I will not burden you with anything but one or two short quotations from that report, which is remarkably well written.

> "It is our general conclusion, based upon the facts before us, that the primary cause of the questionable conditions affecting the criminal situation in Cleveland is a breaking down of the efficiency of the various departments and instrumentalities of justice in the criminal courts. The result of this has been the failure of the fundamental purpose of the criminal law, to wit, to afford adequate protection to the citizens of the city in their lives and property. This deplorable condition is the penalty of laxness which has given Cleveland the name of being an easy town to all the worst criminal elements throughout the country. Vigorous law enforcement alone can correct the condition by all charged officially with this duty, both administratively and judicially.
>
> The criminal statutes are adequate for the purpose, with here and there some minor amendments, several of which are in this report suggested. The city is only now reaping the result of a system of toleration, laxity and inefficiency in public office and leniency to the criminal elements indulged in during the past years and the sacrifice of the rights and privileges of citizens, and has arisen principally through political expediency.
>
> Nevertheless, we would be derelict in our duty if we did not express our conviction that the short and uncertain tenure of judges results too frequently in a departure from the high standards of law enforcement which is necessary to impress criminals with fear of the law."

The report then passes on to a discussion of the laxity being due in part to the elective system.

The report was startling, although it accomplished nothing in the Bar Association.

But about that time the Legislature passed a bill which resulted in the appointment of two special prosecutors. That appointment was necessary because the prosecuting attorney himself was to be investigated, and unfortunately our law does not confer upon our attorney general the powers possessed by that officer in this State.

I think there was an initial mistake which proved somewhat detrimental to the success of that investigation. They made a bi-partisan appointment. Two very excellent men were appointed, but one was appointed, not for his ability alone, but because he was a Republican. The other, a very able and estimable lawyer of excellent standing, was appointed because he was a Democrat. That gave the investigation a partisan feature, which I think was an embarrassment when later they dealt with certain problems.

The grand jury was in session some months and they made a report criticizing with a good deal of vigor some matters in the police department, some matters in relation to the prosecuting attorney himself, said that the prosecuting attorney should resign, said that the director of safety, who, under our charter, is in charge of the police, should be removed by the mayor. They made various similar statements, but nothing came of it.

The two special prosecutors worked vigorously for five or six months. They were public spirited enough to serve without pay, but I do not think they were successful in creating public confidence. I do not think the people of the city felt that they had dug down really to the roots of the situation. It was a mere head-hunting expedition, and since they returned with no scalps except the scalps of a few unimportant persons who were charged with having committed perjury before the grand jury, and later these indictments were nolled. Since the investigation was therefore bare of results, the city considered that it had been a failure. I don't mean to criticize the men who conducted the work, because they are friends of mine and of high character. Perhaps I should add the prosecuting attorney did not take the hint, for he did not resign.

On May 7, 1920, about midnight, three men met on the corner of two of our prominent streets in the downtown district. One of those men was shot in the back. His name

was Kagy. The name of another was Joyce, a rather disreputable person who had served when he was doing any real work as a bartender and a man who had been arrested a good many times. The identity of the third man has been a subject of a good deal of dispute.

You will get the picture of the location if you will carry in your mind for the moment the letter L, and those of you who are familiar with Euclid Avenue will treat the long part of the L as Euclid Avenue and the short part as a north and south street called East Ninth Street.

The admitted facts are that this man Kagy and this man Joyce and the Chief Justice of our Municipal Court went down Euclid Avenue until they came to East Ninth Street and the auto turned north on East Ninth Street.

These dinner tables furnish a good illustration, if the long one may be used to illustrate East Ninth Street and the shorter one Euclid Avenue.

The dispute is whether the chief justice left the automobile a few hundred feet north of Euclid Avenue or whether he proceeded down East Ninth Street past St. Clair, past Superior, past Hamilton, to the point where the automobile stopped. It was his automobile. He says he got out of the machine two or three hundred feet north of Euclid Avenue, that he did not proceed the thousand additional feet to Hamilton and East Ninth. He says he was not at the scene of the shooting.

There were four policemen within five hundred feet. These three men were wrangling about money on the corner. They were all in a maudlin condition and one very drunk. Three policemen passed on the sidewalk, the same side of the street, at 12.30 or 12.35 in the morning. The light was adequate. The ex-chief justice is a well-known person, for he occupied that position for eight or nine years. The other two persons were disreputable and should have been known to the police. There were, you will observe, four police within five hundred feet, and two of them were on the same side of the street. When the shot was fired those two were walking north towards the Lake and were 330 feet from the scene of the crime. They were able to turn around and run back and catch Kagy before he fell, but they could not see the drunken Joyce staggering south, nor the big man going diagonally across a

99-foot street and down a side street, nor could the other two policemen who had proceeded on the other side of the street, who had gone down such a distance that they were on Lakeside Avenue only fifteen feet west of East Ninth. They heard the shot but they claim they could not get around in time to catch anybody.

Joyce in fact, was not arrested for four or five days, they caught him when he surrendered. He was tried and he was acquitted. McGannon, the judge, was then tried. The jury stood 10 to 2 for conviction.

I think there are very few people in the city of Cleveland who are charitable enough to think that Judge McGannon was not present. I think it might be said that nearly everyone thinks that he was present at the scene of the crime, although there is a great difference of opinion as to whether he fired the shot. Personally I think Joyce killed Kagy, although I believe McGannon was unquestionably present.

The first trial was 10 to 2, McGannon claiming an alibi. He brought along many witnesses who claimed they saw him get out of the automobile two or three hundred feet north of Euclid Avenue, and he claimed that from that point he went down Superior Street, and that he was not within seven or eight hundred feet of the scene of the crime.

The second trial took place some two or three months after the first—to be exact, in the month of March, 1921—and resulted in a verdict in favor of McGannon.

You will remember that three men met on a street corner. One was shot and he had died. The other two had been judicially determined to be innocent, and it therefore had been judicially decided that Kagy had committed suicide.

This was a little too much for us to stand. A wave of criticism went over the town. People had watched the first Joyce trial with criticism, the first McGannon trial with increased suspicion, but the second McGannon trial was such as to cause an outburst of indignation.

I have repeatedly said that McGannon performed a divine service for the Cleveland Bar in that he created a resurrection. Having been a member of the Executive Committee of our Association for some years, it is not inappropriate for me to say that our Bar Association as a social body has been a delight; as a memorial organization we have paid fitting

tribute to the worthy dead, but we have neglected to attend to the unworthy living.

But the second McGannon trial made a vital, living force out of the Bar Association.

The Foundation Survey had been decided upon after the first McGannon trial, therefore, between the first and second McGannon trials. I was not on any of the committees of the Bar Association; I was not an officer of the Bar Association. The credit that I think is distinctly due to the Bar Association it is quite proper for me to proclaim, because I had no participation in the affair. The chief justice had the impudence to go back upon the municipal bench and the Bar Association had the courage to serve notice upon him that he must leave that bench at once, and he did. They immediately took it up with the Governor and practically issued an order to the Governor that he should appoint John Dempsey as successor, and Governor Davis was accommodating and he acquieseed, that is, he appointed our nominee.

The Association immediately started to raise a subscription fund to prosecute the persons who had plainly perjured themselves. One of our leading trial lawyers, Mr. David, was selected, and the prosecuting attorney was wise enough and considerate enough to make him a special assistant at a dollar a year, and the prosecuting attorney worked with Mr. David on these cases. They convicted some six or seven of perjury, and obtained some pleas of guilty. They convicted McGannon of perjury. They filed an information charging various witnesses with contempt and the hearings in two of those cases have taken place. McGannon has been found guilty of contempt, the contempt consisting in perjury before Judge Powell in the second trial.

His junior counsel was charged with being implicated in a conspiracy. The court severely criticized him, saying he did not believe him, but felt that the evidence was not adequate, owing to the quasi-criminal character of a contempt proceeding to justify finding him guilty. The senior counsel has never been included in any of the suspicion and all feel great regret that he was connected with the litigation. He is a man of standing and one of our best trial lawyers, and there has been no criticism of him.

The Cleveland Foundation, as the president has said,

started this survey, and you may be interested to know that the Cleveland Foundation is an organization, really the outgrowth of some ideas of Mr. Goff, somewhat patterned after the Carnegie Foundation. The Foundation felt that there would be greater confidence in the work if the work was done by outsiders. I think they were entirely correct. Not that you could not trust the Cleveland Bar, but the Cleveland public wanted the job done thoroughly and felt that it would be done better, more efficiently, if done by outsiders.

As you know, Dean Pound and Prof. Frankfurter were kind enough to agree to direct the survey. They chose Messrs. Smith and Ehrmann to have charge of the report in reference to criminal courts; Mr. Alfred Bettman of Cincinnati, who for nineteen months was assistant attorney general and argued the Debs case in the Supreme Court of the United States, to deal with the subject of prosecution; Mr. Albert M. Kales, an attorney from Chicago, to handle legal education. Dr. Herman M. Adler, state criminologist for the State of Illinois, was kindly loaned to us by that State. Mr. Burdette G. Lewis of New Jersey made the investigation in reference to penal institutions and Mr. Raymond Fosdick of New York, was kind enough to take the department relating to police.

As Mr. Smith has described the work of the survey in a recent article in your magazine, I will not take the time to give details.

An advisory committee was appointed, composed of some thirty-five people, and I happened to be chairman. The name sounded attractive, and we all were puffed up with the idea that we were going to advise Harvard professors, but we found that in practice we were a mere kicking strap that had been skilfully inserted between the hoofs of the bar for the purpose of protecting the professors and the Foundation Committee.

As you know, Cleveland is larger than Boston, but it is composed of a larger percentage of foreign born. A large percentage of the citizens of Boston come from the British Isles, but we, on the other hand, have drawn largely from eastern Europe. As the result, our problems are more complicated.

The work relating to criminal courts has been finished, the

work relating to police has been completed, the work relating to prosecution has been finished and those reports have been made public. The others have not as yet been made public.

You may ask, what have we learned by the survey? We have been made more conscious of the extent to which criminal practice is shunned by certain types of lawyers. I am just as guilty as anyone else, because although there are fourteen in our organization, we take practically no criminal business. I have no special suggestions or remedies. It is a difficult problem to deal with, and yet we must keep in mind where those cases are going to gravitate if the rest of us refuse to handle them. If we will not handle them, we owe a duty to ourselves, the profession and the public to see that they are handled by men of integrity and honesty.

We find not the slightest reason on earth for doubting the integrity of any of our judges. We do find that there is particularly prevalent the baleful influence of the lawyer who practices more politics than law. That is naturally more harmful in a community where the elective system prevails.

We have a non-partisan ticket and it was thought that this would remove the judiciary from politics. It is certainly debatable whether it has been an improvement. Candidates no longer have behind them a political party, and in the nature of things they are pretty nearly forced into forming a political committee—at least they seem to think so—and they are forced into a type of advertising that certainly unfits them for the bench. There is now a judicial campaign going on in Cleveland. John Dempsey's appointment as chief justice expires with the November election and he must run for the office, if he is to continue to serve. A man named and a man named are running against him, and it may interest you to see to what lengths some political advertising goes. (Producing a card.) That is a card put out by thousands. That is a small one, but it illustrates the mental attitude, of course, of an extreme type. I shall not vote for this man; many others will not, but there is grave danger that the majority will; and I say that a man who has that attitude towards the bench is unfit to sit on it.

We have a situation in Cleveland that is different from what you have here, if I understand your law correctly. We

have a division of responsibility which is full of defects and is one of the fundamental causes of our present situation. Right here let me say that the directors of the survey, Dean Pound and Prof. Frankfurter, from the beginning have made it plain that this is not another head-hunting expedition. To illustrate, we are not trying to solve the mystery of the Kagy murder. We are not trying to determine that question. We are trying to analyze and determine the conditions and the causes that have made a McGannon possible.

Take our prosecuting attorney situation. Our prosecuting attorney is similar to your district attorney. He is elected, as your district attorney is elected. But the county prosecutor has not the functions nor the power that your district attorney has. His duties are divided in this curious and unfortunate way. The county prosecutor is elected and has charge of the grand jury in the prosecution of felony cases. Misdemeanors, preliminary hearings, etc., are conducted in the police court, into which the prosecuting attorney does not enter. The police prosecutor, as we term him, although that is inaccurate, is an assistant to the Director of Law. The Director of Law is known in some states as City Solicitor. He is appointed by the Mayor. In other words, the prosecuting attorney is elected; the attorney for this city is appointed by the Mayor. Sometimes the county prosecutor is a Democrat and the Mayor is a Republican. When this takes place we have a Director who is a Republican and therefore police prosecutors who are of that party. When the county prosecutors and police prosecutors are of opposite politics there is frequently no harmony and there is certainly no power that can compel them to co-operate. This division of responsibility is prolific of mistakes and confusion.

The location of our courts is also bad. We have five buildings; two are adjacent to each other, the others are separate. Two are new and three are old—old even for our city, and not modern in the appointments.

This survey, of course, is concerned exclusively with the criminal branch. In other words, it is a survey relating to criminal justice in Cleveland and has nothing to do with the civil branch.

Our municipal courts have rather extensive jurisdiction, in some respect, I think, broader than your district courts,

but when it comes to crimes of the class of felonies they have no jurisdiction except to conduct the preliminary hearing. The man is bound over to the Court of Common Pleas—or railroaded over is probably more literally correct. About 90 per cent of the business of the Court of Common Pleas originates in the Municipal Court.

The situation in reference to the number of judges is unfortunate. We have ten municipal judges for the city of Cleveland. They are paid what I think is an adequate salary of $7500.00. The Common Pleas Judges are paid $8000.00, but only two of the ten municipal judges ordinarily devote themselves to criminal cases—occasionally a third. That means two out of ten are attending to the criminal branch, yet the criminal branch has 27,000 cases a year. Each of those two judges averages about 12,000 cases a year. Each of the remaining eight in the civil branch have on the average 2400 cases a year, and of the 2400 about 2100 relate to cases under $300.00.

We are giving too much time to dollars, and too little time to human beings.

We take on the average two and a half to three minutes per case—I do not mean that more important matters do not take longer, but on the average as they pass through the courts. Of course the cases do not get an adequate amount of attention.

It has developed that the civil side has very adequate, first-class records. Those of the criminal side are very inadequate. It is almost complimentary to say that they have any records. I am referring to the Municipal Court.

In the Municipal Court we find grave abuses. We have what we call a system of "No Papering." "No Papering" refers to cases where there has been an arrest before an affidavit has been filed. The case, however, gets on the judges' docket and up to that time there is no affidavit. When it is called, the police prosecutor, if he wants to dispose of it, says, "No papers," and the judge lets it go at that, rarely saying anything, rarely making any inquiry.

We have the same abuse as to the *nolle* power. Technically, a case cannot be nolled without the consent of the court, but in practice, of course, the recommendation of the prosecuting attorney is always followed.

We have what seems to me an anomalous situation, called the "Motion in mitigation." In practice it works out this way: The court sentences a man; his attorney files a motion in mitigation; the judge reconsiders the case and often imposes a lighter sentence. The heavy sentence is sometimes seemingly imposed to please the public and the final sentence to please the defendant.

In the county prosecutor's office the situation is much better. Great murder trials and cases that the newspapers are interested in are carefully prepared and well tried. But the ordinary class of cases must be examined in order to determine how an office is being administered. The survey spent over $10,000.00 for statistical work, examining and tabulating every one of the cases for 1919 and 1920 in the Common Pleas Court. In the Municipal Court we could not do this because they handle 27,000 cases a year. We took every tenth case, so we examined between 6,000 and 7,000 cases in that court. In the Common Pleas Court the situation is better, although the bench parole, the suspension of sentence and the nolling of cases are handled in rather a loose way.

Mr. Fosdick has found in connection with the police some things that are very startling. The army test was applied to our detectives. I assume we all believe that the detective force should be superior to any other branch of the police department, but they stood the lowest. As Mr. Fosdick said, it was not surprising that we did not catch more, but it was surprising that we caught any.

It may interest you to know, if you own a Packard automobile and live in Boston, the rate for insurance is half what it costs in Cleveland. There is, therefore, a commercial aspect to the crime problem; in other words, it costs money to administer criminal justice inefficiently.

Passing hurriedly along—as I see my time is rapidly expiring—I will say that you may wonder how the survey is being received. Well, taking the judges first, it is apparently a pleasanter occupation to judge others than it is to be judged. I find that I now understand what Mr. Dooley meant when he said that "The American judiciary are as fine a body of irritable and indignant gentlemen as can be found in the land." Some of the judges have not been good sportsmen.

There are three newspapers in Cleveland. I have represented one of them for twenty years. That one showed its impartiality by knocking us from the beginning. One thing that it printed was pretty good. It said: "An ounce of prevention is worth a Pound of Frankfurters." This paper was the only one that seemed critical. The last week there has been a radical change, and it has published some editorials commending us and speaking nicely of various things, and therefore I may now say that all newspapers are favoring the survey and giving us their support.

In conclusion let me say, as I view our situation, it is this: The evils might be said to be three: Newspapers which are sometimes yellow, some judges who are sometimes weak, and some lawyers who are sometimes money-mad. I think the only thing that will remedy these conditions is a strong, virile bar. I do not believe a mere voluntary association will accomplish the results. I think it must in some form or in some way be given a legal basis. There are 1400 lawyers in Cleveland. Eight hundred belong to the Bar Association. One hundred and ten of them have not paid their dues. One-half of the bar, therefore, is carrying the load. Although Mr. David and the county prosecutor and the executive committee of the Bar Association did wonders last spring, the money that was raised was raised out of one-quarter of the Cleveland Bar.

We must find some means by which we can finance the Bar Association and put it on a strong basis. Our budget is only $7,200.00 a year; it ought to be $30,000.00. We have one secretary, who is paid a salary and does nothing else. I want two. I want the secretary of the Cleveland Bar Association to get $9,000.00 or $10,000.00 a year. I want at least $10,000.00 or $12,000.00 in a fund to take care of prosecutions.

For many years I was one of the attorneys for the Prosecution Committee of the Credit Men's Association. We found that when we established the Fraudulent Failure Fund, the statistics demonstrated that people were not so apt to become crooked in bankruptcy.

I have thought of a very radical measure if no better plan can be adopted, that is, I would have the City of Cleveland place an occupation tax on lawyers and thereby raise $25,000.00 to $30,000.00 a year. This would make all lawyers

contribute. This fund to be administered by lawyers and to be expended to better the administration of justice. If such a plan were adopted, we could protect the public from crooked lawyers, the lawyers from tyrannical judges, and judges from the attacks of yellow newspapers.

I do not care what plan is adopted, but believe it is essential that the legal profession adopt some method that will increase respect for law, for the greatest evil now confronting us is disrespect for law.

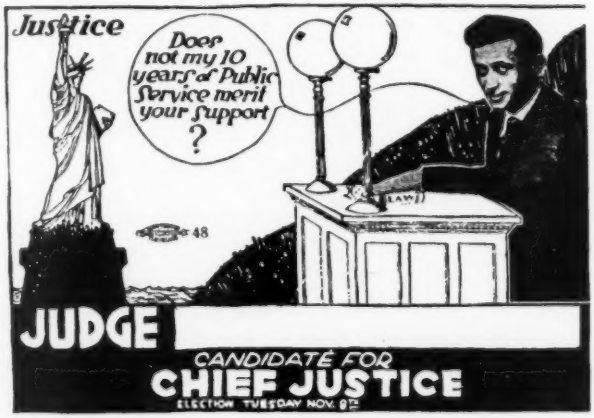
We must remember that the success of the American idea of government is peculiarly dependent on respect for law, and that the worst undermining influence is the "highbrow lawbreaker."

It therefore behooves us to preach respect, to practice it, to teach it to our children until it becomes, as in ancient Sparta, a national instinct.

Note

The campaign card, used by one of the candidates in the recent election of a chief justice of the Municipal Court of Cleveland, produced by Mr. Thompson and referred to in the foregoing address, is here reproduced. We are informed that the candidate thus advertising himself was not chosen, and that Chief Justice Dempsey, also referred to in this address, was elected.

F. W. G.



MR. GREEN.—I think that the members of the Massachusetts Bar Association are deeply grateful to Mr. Thompson for coming so far in our honor to tell us of the conditions in Cleveland, of which we had had some slight knowledge, and for stating so clearly the steps that are being taken to meet them. I move, sir, that as an expression of our gratitude and our appreciation we give him a rising vote of thanks.

THE PRESIDENT.—We are fortunate in having with us tonight the chief law officer of the Commonwealth. Although the hour is late for such of us as propose to return by the train which leaves in about forty minutes, I think it would please you all to have him say a word to us if he will.

REMARKS OF THE ATTORNEY GENERAL, HON. J. WESTON ALLEN

Friends of the Massachusetts Bar Association:

I have been trying to get here all day. Although I could not attend your meeting, I am very glad indeed that I was able to get away in time to hear the interesting and inspiring address to which we have just listened. I wish that all of the Massachusetts bar could have had the inspiration that has come to us from what the guest of honor has said.

It is with all humility that any attorney general of this Commonwealth speaks in the old city of New Bedford. It is a noble list of attorneys general which this Commonwealth can point to in the past, and there are no more honored names upon that roll than the names of Clifford and of Knowlton.

We are all deeply stirred by the recent decision of our Supreme Judicial Court, but I am speaking to you who are on the firing line with me. When a man is on the firing line it is no time to talk. In that decision, and as a result of that decision, the things that seem to me worth while are the things that perhaps are not first in our thoughts. The man would be unworthy who would regard the outcome of that decision as in any respect a personal matter, or would feel anything but regret over the downfall of a public official. But that decision means something more than the removal of an individual from office. It means that our highest court has stood for principle in this Commonwealth. And the by-

products, if I can call them by-products, of that decision are the effects that it has had and is going to have upon the bar and upon the people. I have been told by men who are large employers of labor in the State that among those who are working for them there is a feeling that since that opinion conditions are better for them and they appreciate more our courts and the protection of our courts. And I have been told that the younger members of our bar feel differently and their outlook has been broadened because of the masterly enunciation by our chief justice of the ethics of the profession.

While I have spoken of those results of the decision of our highest court as by-products, the thought that I wish to leave with you is that, after all, they are not by-products of the decision, but that they are the fundamentals which make that decision worth while. If the decision of our highest court did not receive substantially the universal verdict of approval of the people, I will not say it would not be worth while, but it would not be so much worth while. And if it leads the young men who have entered the bar and the young men who are about to enter the bar of Massachusetts to look to the profession not merely as a means of getting money, but as a means of honorable service, if it leads those young men who join our ranks, to listen to their oath of office and to take that oath of office meaningly and with a resolution that they will serve faithfully as officers of the court in accordance with that oath—then the decision of our great chief justice has come at a timely hour and a new landmark has been set up on the highway of justice to mark out anew the path of duty for those who lead and those that follow in the preservation of the State.

SUGGESTIONS AS TO HEARINGS BEFORE MASTERS IN EQUITY.

I.

There is general dissatisfaction with hearings by masters in suits in equity. The dissatisfaction is not only general but it is great.

II.

There was some discussion of the matter (1) at a meeting of the Massachusetts Bar Association at Worcester in December, 1919, (reported in the Massachusetts Law Quarterly for February, 1920,) and (2) in the able and admirable report of the Judicature Commission to be found in the Special Number of the Massachusetts Law Quarterly published in January, 1921, pp. 76-85. On neither occasion was there an attempt to deal with the matter exhaustively. No more was attempted in the Judicature Commission's report than to state some defects and to throw out one or more suggestions which might be worthy of consideration. Having in mind the ground which had to be covered by their report the Commission could not have gone further. What I have to suggest here is in addition to what is suggested there and is the result of more mature consideration given to the matter since then.

III.

The Commission suggested that it would be better if in the future the court should limit masters' hearings to taking accounts and deciding similar matters, stating (what is undoubtedly true) that that was the original function of special masters in equity. To that I should heartily agree if it were possible. But confining masters' hearings to that means having the merits of every suit in equity decided by the court. That cannot be done unless additional judges are appointed for both the Supreme Judicial and the Superior Courts. As to this the Commission said, at pp. 84-85: "We are clearly of opinion, however, as stated at the beginning of this dis-

cussion, that the number of judges should not be increased until more detailed information than we have now is collected and studied." It may be assumed that for obvious reasons there is not to be an increase in the number of judges of either court for many years to come.

Another suggestion thrown out by the Commission as worthy of consideration was the practice of having the master secure guidance from the court by way of a preliminary report in case a doubtful question of law arises in the course of the hearings before him. This suggestion is an excellent one and I shall have something to say as to it later on.

The third suggestion made by the Commission was: "The court might well consider some method of requiring periodical reports from masters or auditors of their action and the progress of the case. We believe that such practice would keep the court more closely in touch with the proceedings. We see no better method of overcoming the present easy-going practice, under which the convenience and agreements of counsel control the progress of the case to such an extent that the master or auditor is practically helpless."

I shall have something to say later on as to this suggestion also.

IV.

As matter of convenience the Judicature Commission considered the practice before masters and the practice before auditors as one matter. They have much in common and for the purposes which the Commission had in hand might well be dealt with as one subject. In one respect, however, they are quite different; an auditor's report is *prima facie* evidence only while the report of a master in cases where the rule to the master does not direct him to report all the evidence has the effect of a verdict or, speaking more accurately, the effect which a special verdict at common law had in an action at law. For my purposes it is more convenient to consider the practice before masters in equity by itself.

V.

The Judicature Commission has given it as their opinion (as I have already said) that if it were possible the best

thing to be done with respect to masters' hearings in suits in equity would be to stop sending cases to masters to be heard on the merits and to confine masters to their original function of settling accounts and deciding similar matters after the merits have been decided by the court. But that is out of the question. As I have already said, it cannot be done without increasing the number of judges of both courts, and additional judges will not be appointed for many years at least.

That being out of the question, that is to say, it being settled that the merits of many if not most suits in equity must be sent to a master for decision, the question I propose to discuss is: What can be done to better the administration of justice in this connection and remove the general dissatisfaction which now exists?

As matter of logic the answer to that question is plain. As matter of logic since the best thing possible would be to have the merits in all suits in equity decided by the court and since that cannot be done, the next best thing is to give the master when he is hearing a suit on the merits all the power and authority of a judge of the court, all the power and authority which a single justice has when sitting to hear an equity case on the merits.

I always distrust an argument which is purely logical. I therefore wish to consider whether this solution of the difficulty is a logical result merely or whether on a full consideration of the matter it is the best solution to be found. I believe that it is the best solution. I proceed to state my reasons for that conclusion.

VI.

If you are going to give to the master when hearing a suit in equity on the merits the power and authority of a single justice the first thing to be done is to change the terms of the rule sending equity cases to masters to be heard on the merits. The terms of the rule now in use in nearly every case (in Suffolk County, at least,) are in substance: To hear the parties and their evidence and report his findings of fact to the court. The court can direct the master: To hear the suit on the merits and report to the court his findings of fact and his rulings of law including the terms of the decree which ought to be entered in the case.

Today the practice is almost universal to use the more limited rule in sending a suit to a master to be heard on the merits. It is in exceptional cases only that the broader rule is used. The practice of using the more limited rule is so universal that the very definition of special masters in equity has recently been said to be: "Officers appointed to hear the facts and report their findings to the court in equity cases." I am not sure that it is not the general assumption of the bar that that is of necessity the sole power that can be given to a special master in equity. Of course, that is not so. That that is not so is pointed out in *Cook* v. *Scheffreen*, 215 Mass. 444, 449.

My first suggestion is that the practice in this connection should be reversed and that the broader rule should be used ordinarily and the more limited one should be used in exceptional cases only.

VII.

So far as I can learn the practice of using the more limited form of rule has never been the subject of careful discussion and mature consideration. It is a matter which has not been dealt with in the rules of the court and so far as I know has not been a matter of consultation among the judges. I cannot help thinking that the terms of the rule sending a suit in equity to a master to be heard on the merits is a matter which has never received due consideration.

VIII.

What benefits will ensue if this change in the rule sending the case to the master is adopted?

The first and most obvious result will be to do away with the time now spent by the master in finding facts on alternative theories of the law governing the rights and liabilities of the parties to the suit. If the broader form of reference to the master is used the master will rule upon what the substantive law governing the suit is and find the facts in accordance with his ruling on that question. The finding of facts on alternative rulings of law will be wiped out *ex vi termini.*

Of course, if the court ultimately holds that the master was wrong in his ruling as to what the substantive law of the suit

is the case has to go back to him to find the facts under the decision of the court as to what the substantive law is. But would not that be better than the practice which now obtains of finding the facts on all the alternative theories as to what the law may be ultimately held to be?

But that is not the only alternative. There is the third course of action already referred to, namely: In case the master is in doubt as to what the substantive law is he could and should make a preliminary report and submit that question to the court.

Of course, this third course of action could be adopted in case the more limited rule to the master had been used. There is however this difference: In cases where the more limited rule to the master is used the master has to find the facts on all alternative theories of substantive law or send the parties to the court for a decision on that question. While in cases where the broader rule is used the master can decide what the substantive law is if he thinks there is no great doubt about it and make a preliminary report to secure further guidance from the court in the few exceptional cases only where the question of substantive law is in fact a difficult one.

There is one other respect also in which the course of trial is improved in case the broader rule of reference is used. It is more satisfactory to try a cause (whether it be an action at law or a suit in equity) as a whole first and take up the question of what the law is when it has been decided what the case is which has been made out in the evidence. It is as a general rule much more satisfactory to find out what the case is and then consider what the law governing that case is than to undertake in the first instance to find out what the law is and then see if the facts do or do not fit the law which has been passed upon before it is found out what the facts are; that is to say when the question of what the substantive law is is passed upon to some extent as an academic matter.

Whichever form of rule to the master is used the present practice of finding facts in the alternative should be abolished and the master should be given to understand that he ought in this and in all other matters to secure the judgment of the court under and by way of a preliminary report whenever in his opinion that is desirable in the trial of the suit which is referred to him.

IX.

But what I have already said is not the only advantage that will ensue from adopting the broader rule and the adoption of the broader rule is not the only suggestion I have to make in order to do away with the present dissatisfaction in respect to hearings before masters in equity.

I can (I think) best lead up to the further suggestions I have to make by describing the present practice in sending a case to a master and the travel of the case after it has been committed to the master's hands.

Under the practice as it obtains today counsel assume that every suit in equity is to be sent to a master in case the pleadings result in an issue of fact. In a case where the pleadings end in an issue of fact counsel attend in court, tell the single justice sitting in equity of the fact that there is the suit in question, that it has resulted in an issue of fact, and state to the court that they have or have not agreed upon the person who is to be appointed master in the cause. If the judge finds that it is not practical for the court to hear the case on the merits and counsel have agreed on the master he is appointed. If they have not agreed upon the master he is chosen by the judge. In either case the limited form of rule is used as a matter of course. Having got the case before the master counsel ordinarily sit back and take an assignment for a hearing when nothing much else is doing in their respective offices and when it is convenient for their respective clients and their principal witnesses to go on with a hearing or hearings. After hearings have begun postponements and new assignments are made on the same basis. Possibly this is an exaggeration. But however that may be one thing is certain: As hearings before masters are conducted today the master is helpless in pushing the hearings and in pretty much every respect. In case he thinks the case is not being properly pushed he cannot set it down for a hearing; and it is not possible for him to refuse to postpone if parties agree to postpone; and when the matter of assignments or postponements is under consideration the convenience of the master is the convenience last considered. If he is not ready to go on when counsel and parties wish and not go on when they do not wish he is not likely to be agreed upon as a master in future cases.

As things go now a master is a sort of fact-finding slot-machine set in motion when counsel, parties and witnesses find it convenient to set him in motion, and when set in motion he is bound to find the facts on any and every issue which the parties request. Possibly again this may be in some respects an exaggeration. But however that may be this is true: The master is not and cannot be the dominating power in the matter and try the case as a judge tries the cases tried by him. A judge can and often does shorten the hearings before him by suggesting that for the present at least counsel need not go further in respect to an issue of fact or a rule of law; a master sitting under the more limited form of rule is not expected to do that and as a matter of fact he does not do that. A judge will try in one day a case which will take two or three days at least before a master. One reason for this is the matter I have just referred to, namely, as matters go today the master is not and cannot be the dominant power and cannot direct the trial as the magistrate trying the case (whether judge or master) ought to be and do.

When I say that a judge will try a case in one day which it will take a master two or three days to try I do not mean that masters do not do their work well. I think that they do. What I mean is that the same man sitting as a judge can try a case in one day which it would take him sitting as a master two or three days to try. The trouble is not with the men but with the system.

X.

The next change which I have to suggest is that the court in issuing the rule to the master should specify the day on which the hearings before the master are to begin and also should provide that the hearings should go on from day to day until the evidence is closed.

The delays which today are incident to a suit in equity being heard on the merits by a master constitute one of the greatest causes of the general dissatisfaction with masters' hearings. Can a better way be devised for ending these delays than by having the day when the hearings are to begin fixed in the rule sending the case to the master and by having it provided in the rule that the hearings shall go on from day to day until the evidence is closed?

Of course, the court cannot fix the day when the hearings before the master are to begin and provide that the hearings shall go on from day to day unless a protective order is issued in every case in which those provisions are made in the rule. *

The changes which I have just suggested, namely: That (1) the rule to the master should specify the day on which the hearings are to begin, and (2) that the rule should provide that the hearings should go on from day to day until the evidence is closed, and (3) that a protective order should issue as a matter of course in every case are so revolutionary that at first blush the adoption of them may seem to be going too far. But if you consider the matter for a moment, is it going too far? Without question delays in hearings before masters will come to an end if these suggestions are adopted. What reason is there why they should not be adopted? We are all agreed that we should have the best administration of justice that can be had in this connection if all suits in equity were heard on the merits by the court and not by a master. If all suits in equity were heard on the merits by the court the standing which the protective order gives to the case in hearings before a master would result *ex vi termini*. The only matter which the suggestions I have made adds to what would ensue if all suits in equity were heard on the merits by the court is that a special assignment is made in the rule to the master for the beginning of the hearings. Having in mind the present practice as to getting an assignment before a master I think that that addition ought to be made to what would ensue if suits in equity on the merits were heard by the court.

If it is provided in the rule sending the case to the master that hearings shall begin on a day specified in the rule and shall go on from day to day, no postponement can be had without a subsequent order of the court. This follows as a matter of course. I think that is an advantage and not a disadvantage. It is necessary to break up the practice now firmly rooted of masters' hearings being postponed whenever either party finds that to be convenient.

* There seems to be some confusion of thought upon the nature of a protective order. A protective order does not provide that while engaged before the master counsel shall be excused from going on in other courts. No court could or would issue such an order. No court would or could undertake to control the trial lists of other courts. What a protective order does is to give to hearings before the master the standing of a trial in the court which issues the protective order.

I have not been able to think of a better way of wiping out the delays in hearings before masters. I do not think that any disadvantages will ensue if the way which I have suggested is adopted. Possibly I may be wrong. The suggestion at any rate is one worthy of consideration and this consideration will without doubt produce a better way of getting rid of the delays now incident to masters' hearings if a better way can be found.

XI.

If the suggestions which I have made are adopted I do not think that anything further need be done to secure the wiping out of delays in the trial of suits in equity by masters.

But if this be not so or if these suggestions are not found worthy of adoption there is another way of securing promptness in that matter. That is to have masters make periodical reports (say twice a year) of what has been done in the cases pending before them, to be followed by a calling of the docket of those cases within say two weeks after the day when the master's report is due. At the calling of the docket the court could in its discretion dismiss the bill without prejudice if the plaintiff has been in default or direct hearings to go on at a day fixed, whether the defendant is present or not if it is the defendant who has been in default.

XII.

Following out the suggestion that the way in which to do away with the present dissatisfaction with masters' hearings is to give to masters the power and authority of a judge, I come to the matter of a stenographer. One reason why a judge can try a case in a third or a half of the time in which it can be tried by a master is that when it is tried by a judge the evidence is taken by a stenographer. When the evidence is taken by a stenographer the magistrate trying the case (whether he be judge or master) can concentrate his mental strength, and the whole of it, on realizing what the evidence is as it goes in and what its bearing is on the issues of the cause in a way that it is not possible for him to do if he has to devote some of his strength to formulating notes of the evidence and writing them out in longhand. The ideal way

of trying a case is for the judge to devote his mind to taking in what the evidence is as it goes in and what its bearing is upon the issues, and never taking a note of what the evidence is. I do not mean that he ought not as the trial goes on to make a list of the witnesses, a list of the affidavits and a chronological statement of the facts in the case. But I do mean that he never ought to take a note of what the evidence is. I believe that no magistrate (be he judge or master) can try a case well if he undertakes to take notes of the evidence in addition to understanding what the evidence as it goes in is and what its bearing on the issues really is.

A good arrangement (if it could be made) would be to let the county pay the expense of having the evidence taken down in shorthand, coupled with an agreement by the parties that they would have so much of the evidence written out as the judge should ask for, the expense of writing out this copy of the evidence to be shared or taxed in costs and so paid for by the losing party.

If that arrangement were made and the other suggestions which I have put forward were adopted I believe that there would be a saving of money both for the county and for the parties. Money would be saved by the county because the master would try the case as quickly as a judge would, that is to say in a third to a half of the time which is now taken by masters under the present system. The result would be that with fifteen dollars a day for taking down the evidence added to the master's compensation the county would pay less than is now paid for the master who takes down the evidence in longhand. And money would be saved by the parties because the expense of writing out one copy of the evidence to be shared or taxed in costs would be less because the fee paid by the party to his counsel would be less since the case would be tried in one-third to one-half the time.

This arrangement could not be made without further legislation. The power of the Supreme Judicial and the Superior Courts today is limited to directing the county in question to pay to masters reasonable compensation "for duties performed under the direction of the courts." Gen. Laws, c. 221, §55. To make the suggested arrangement possible this statute would have to be amended so as to authorize the courts to direct the payment of reasonable compensation to stenographers

in hearings before masters when the employment of them is specially authorized by the court.

XIII.

When I determined to make some suggestions as to hearings before masters in equity I expected to include among them a recommendation that the rule sending the case to the master should provide that the issues on which the trial before him was to be had should be settled by him before the hearings began in the way in which the issues are now settled in all cases before the Supreme Court in England.

Speaking of this practice the Judicature Commission said: "It has been said upon the best authority, and it is generally agreed by those who have applied, or observed, the practice in the English and some of the Canadian courts, that one of the most effective methods of despatching business and avoiding unnecessary waste of time, money and effort in the trial and hearing of cases is the system of preliminary examination of parties or their counsel, either before the court or before an official master to ascertain definitely what are the actual points of dispute between the parties and what questions are undisputed, so that the real issues in the action may be ascertained in advance and the trial directed to the decision of those issues."

I then thought this to be true. Since then I have made a study of the matter and am more than convinced of the truth and accuracy of this statement. At that time I was inclined to the belief that this improvement in the administration of justice could be tried out and the bar become familiarized with it by its adoption in masters' hearings. I was inclined to think that this could be done without legislation because that was the view which the Judicature Commission was inclined to take. Speaking of the practice of having the issues settled by the court before the trial begins the Judicature Commission said: "No legislation is probably needed in regard to defining issues at present at least. If a closer study of the inherent functions of the courts and the existing rule-making power should develop the need of legislation the matter can be brought up later. We think that the court has sufficient power now to act by rule upon this matter." (p. 113.)

But a study of the matter which I have since made has led me to the conclusion that this change in the trial of causes cannot be made without legislation.

This is not the place to go into this matter. I am making suggestions as to bettering practice in masters' hearings and what I have written is already too long. I propose, however, to add a short statement of my reasons for thinking that the court cannot adopt the English practice without further legislation. In order that it may be as short as possible I shall not fortify my statements by authorities. Rosenbaum's Rule Making Authority contains an admirable description of the practice and is fortified by abundant citations of authority.

The English practice of having the issues defined and settled by the court before trial, originated in a desire to abolish pleadings and it has had that effect. At common law the issues (both in actions at law and in suits in equity) are left to be defined and settled by the parties. This was and is done by the parties in their pleadings. But under the practice which obtains today in England and in jurisdictions which have followed the English practice, the issues on which the cause is to be tried are settled not by the parties but by the court after conference between the court and the parties. The parties attend before the court and on questions asked by the court and on statements made by counsel the court decides what facts are not in dispute and what facts are in dispute. An order is then made settling the issues on which the cause is to be tried. As a matter of fact, in order to make the order efficient the court at that time deals with discovery (of documents or of other evidence) with admissions of facts and particulars of claims. But those matters are incidental; they do not give character to the proceedings. The proceeding has brought about a fundamental change in the determination of what the issues are on which the cause is to be tried. The court now performs the function which pleadings heretofore performed. In other words the function performed by pleadings is abolished. The whole system of having the issues determined by the parties is abolished, and for that system the new system is substituted of having the issues settled by the court.

Such a change in procedure (it seems to me) is not within the rule-making power of Massachusetts courts. The authority

given to the Supreme Judicial and the Superior Courts is to make rules "not inconsistent with law."

The Practice Act (Gen. Laws, c. 231) assumes if it does not prescribe that in actions at law the issues are to be determined by the parties in their pleadings. Here is a "law" which prescribes that the issues in an action at law are to be determined by the parties. Since Massachusetts courts are limited to making rules "not inconsistent with law" these courts cannot adopt the English practice of having the issues determined by the court and not by the parties, so far as actions at law are concerned at any rate.

There is no Practice Act or other statute with respect to the trial of suits in equity. But the change from the common law system of having the issues determined by the parties in their pleadings to the English practice of having them determined by the court is so revolutionary that it seems to me that in suits in equity also it is not within the rule-making power of Massachusetts courts to make the change.

In England this change was brought about by rule. But the rule-making power in England is an entirely different thing from the rule-making power in Massachusetts. It is provided in the Judicature Act of 1873 (36 and 37 Viet. c. 66, §23) that "The jurisdiction by this Act transferred to the said High Court of Justice and the said Court of Appeals respectively shall be exercised (so far as regards procedure and practice) in the manner provided by this Act or by such Rules and Orders of Court as may be made pursuant to this Act." And by the Judicature Act of 1875 (38 and 39 Viet. c. 77, §17) that rules of court may be made "for regulating the pleading, practice and procedure in the High Court of Justice and Court of Appeal, and, generally, for regulating any matters relating to the practice and procedure of said courts respectively."

In addition in England the rules after they are made have to be submitted to both houses of Parliament and if not disallowed by order of the Privy Council upon an address by either house stand as made. Rules in England therefore have the effect of Acts of Parliament.* A study of the changes

* It may be worth while to point out that the practice of having the issues determined by the court under a preliminary reference was not introduced in New Jersey by rule, but by statute. See N. J. St. 1912, c. 231, §32, taken in connection with Schedule A.V., annexed to that act. (See V. Preliminary References.)

made by rule in England leads to the result just stated. These changes may be found set forth in Rosenbaum's Rule Making Authority.

XIV.

To put my suggestions into a practical form I add the terms of the rule which I think ought to be adopted. I suggest that they be as follows:

"This case came on to be heard on motion of the plaintiff that it be referred to a master and thereupon, upon consideration thereof: It is ordered that the above-entitled case be referred to John Doe, Esq., as master, to hear the case upon the merits and to report to the court his findings of fact and his rulings of law including the terms of the decree which ought to be entered in the case. The master is ordered to report so much of the evidence as may be necessary to present any questions of law raised before him. Hearings before the master shall begin on the ——— day of ——— 192— and shall proceed from day to day until the evidence is closed. It is further ordered that engagements of counsel and of the master in hearings before the master in this case shall be of the same force and effect as an engagement in open court but only upon days when trial actually proceeds before the master. The master is directed to secure by way of preliminary report further instructions from the court whenever in his discretion he thinks they ought to be given. Leave is given to the parties to apply.

By the Court,

CLERK."

The provision in the rule directing the master to secure further instructions whenever he thinks that they ought to be given ought not to be necessary. I suggest that it be inserted because of the prevalent belief and practice that such action by the master is not desired.

The clause giving parties leave to apply ought not to be necessary. But it seems to me to be desirable in view of the present understanding and practice. It is not intended to imply that the terms of the rule to the master are to be

changed on subsequent application by the parties or one of them. The terms of the rule to the master should be settled when the rule issues. Further application by the parties should be restricted to exceptional matters which did not exist or could not be anticipated when the rule was made. For example in case the master should refuse to secure from the court further instructions on a point it ought to be open to the parties or either of them to apply.

WILLIAM CALEB LORING.

BOSTON, December 17, 1921.

Note.

In a discussion of the foregoing suggestions since this article was sent to the editor, it was suggested by an experienced practitioner that the proposed rule should also contain a clause allowing the master to adjourn the hearing for not more than three days without an application to the Court for a special order.

F. W. G.

SUGGESTIONS AS TO CRIMINAL LAW AND PRACTICE.

ANDOVER, MASSACHUSETTS, NOVEMBER 21ST, 1921.

Editor Massachusetts Law Quarterly:

DEAR SIR:

It appears to me that the Massachusetts Law Quarterly is the most available way of reaching the profession. I have therefore put down some matters with regard to the criminal law which seem to me to need attention and submit them to you as the editor. I have the chapter and section for all the statements but it did not seem to me useful to include them.

Yours very truly,

CHARLES U. BELL.

It seems to me that both our criminal law and our criminal practice need revision.

The penalties for breaking the law as stated in the General Laws have no common standard. The easiest illustration is the relation between imprisonment and fine. In most cases where imprisonment may be imposed, a fine is an alternative punishment. It is usually in the words, "Three months imprisonment or a fine of $50.00." Even where the statute imposes fine and imprisonment, a general provision allows the court to impose one only if there has been no previous offence. It would seem as if there would be some fixed relation between them. For instance a one hundred dollar fine might go with one month's imprisonment. This appears to have been recognized by the provision that a person committed for nonpayment of a fine should be discharged after eight days if the fine was five dollars, after twenty days if it was from five to ten dollars and after thirty days if the fine was from ten to twenty dollars. This is now changed to an allowance of fifty cents for each day's imprisonment. (G. L. c. 127, § 144.) Accepting this standard a month's imprisonment should be equivalent to $15.00, or three months to $45.00, or for six months to $90.00. But in fact in the G. L. the fine

given with six months' imprisonment varies from $20.00 to $5,000.00 and between those sums, $50.00, $100.00, $200.00, $300.00, $500.00, $1,000.00. In one case it is $1.00 to $25.00. So in case of imprisonment for one year the fine named varies, $100.00, $200.00, $250.00, $300.00, $500.00, $1,000.00, $2,000.00, $5,000.00. There might possibly be some reason for this variation, founded on the class of crime or the person most likely to commit it. I can find nothing indicating any such reasons.

There are different penalties imposed for similar crimes. For instance, in G. L. c. 268, sections 28 and 31 both refer to giving articles to prisoners, and are substantially identical, but the penalty in §28 is $50.00 or two months, while under §31 it is $500.00 or three years in the State prison. The acceptance of a bribe by a public officer is punished in c. 68, §8, $5,000.00 or ten years, by a juror, §14, five years or $1,000.00, by a sheriff, etc., §37, three months or $300.00. There are several other cases of the same kind.

G. L. c. 123, §§ 110, 111, 112 each end with the words "shall be punished by fine or imprisonment at the discretion of the court." Also c. 207, § 52, c. 126, § 7, and c. 84, § 22 impose a fine at the discretion of the court.

Coming to less important matters. There is a quite frequent use of the word "forfeit." But in the criminal law the word is nearly equivalent to fine. The court says in *O'Connell* v. *O'Leary*, 145 Mass. 30: "Forfeiture, that is, punishment for an offence, not indemnity for a civil wrong." See *E. S. Parks Shellac Co.* v. *Harris*, 237 Mass. 312, 318.

The statutes recognize this. In G. L. c. 280, §1, it is provided, "Fines and forfeitures exacted as punishment for offences or violation or neglect of any duty imposed by statute . . . may be prosecuted for and recovered by indictment or complaint or by an action of tort." In the G. L. I can discover no rule in the use of the words "fine" and "forfeiture." Practically the same offence in one section is punished by a fine and in another section, in the same chapter, by a forfeiture. In many cases of forfeiture nothing is added as to the mode of collection and that falls under the general provision which I have quoted. In one case it is provided that it shall be collected by an action of contract, probably because at common law forfeitures were sued for

in an action of debt. In many more it is provided that it shall be collected by an action of tort, an entirely unnecessary provision being covered by the general provision. In several cases it is provided that the forfeiture shall be recovered by an information in equity brought by the Attorney General before the Supreme Judicial Court. The person who drew the law was apparently ignorant of the distinction between an information in equity, which is one form of a bill in equity, and an information at common law which is a criminal proceeding.

"An information is in its nature a prosecution for some offence against the government by an application to a court of criminal jurisdiction and is essentially a public criminal prosecution." *Goddard* v. *Smithett,* 3 Gray, 116, 121.

In a few cases there is provision for an injunction to follow. But an injunction may issue sometimes even in a criminal case. Even trial justices are named among the magistrates who may issue injunctions. (G. L. c. 220, § 2.)

Why might not all these minor offences omit to name the punishment when it would fall under the general provision in G. L. 279, §5, which is as old as 1782: "If no punishment for a crime is provided by statute, the court shall impose such sentence according to the nature of the crime as conforms to the common usage and practice of the Commonwealth."

There are numerous cases where the punishment is stated to be a number of years in the state prison or one year in the house of correction. As the shortest term in the state prison must be two years and a half, this leaves a gap. If the magistrate should think that the punishment should be two years, he cannot impose it, but must give more in the state prison or less in the house of correction.

The criminal sections are scattered through the whole General Laws, the first being c. 1, § 10, and the last, c. 280, §§ 11, 12.

The administration of the law also needs reformation. There are certain defects which it seems impossible to cure. So long as there are nearly two hundred and fifty persons in the Commonwealth who may impose criminal sentences, uniformity, however desirable, is impossible.

There are other points in which improvement seems pos-

sible. I take the following figures from the Report of the Bureau of Prisons, 1920, for the year 1919. The total arrests were 160,392. The cases begun before the lower courts were 155,068. These were disposed of as follows:

Discharge before arraignment (drunkenness)	49,241
Found not guilty	6,400
Nol pros before trial, etc.	5,744
Remaining before the court	93,683
	155,068

Apparently two-fifths of the arrests need not have been made. Then following the 93,683 cases dealt with by the court, the result is as follows:

Bound over to the Superior Court	2,931
Sentenced	52,941
	55,872

Of these sentences, 9,908 were suspended. What became of the other 37,811 I do not discover. There were findings of guilty, including pleas, of 79,614. Turning to the Superior Court, there were original cases.

Pending from the previous year	2,198
Begun	4,790
	6,988

These were disposed of as follows:

No bills, not guilty, disagreements	667
Nol pros	432
On file before trial	950
Sentenced	919
On file after trial	555
Probation	778
Pending for sentence	525
Untried	1,998
Defaults	99

The figures on the cases appealed to the Superior Court were:

Pending from 1918	2,432
New cases	6,796
	9,228
Convicted or plea of guilty	4,069
Sentenced	1,568
Pending for sentence	877
Carried to next year	2,232

Summing up these figures:

	Original		Appeal	
Nol pros, on file, etc	1,937	29%	3,453	37%
Sentenced	919	13%	1,568	17%
Probation	778	12%	1,089	12%
Trials	407	6.6%	365	4%

The inferences to be drawn from these figures are doubtful except this, that the chances that a person arrested will be sentenced are quite small. The deterrent effect of our criminal law is thereby greatly lessened.

But I wish to go a step further. If a person is sentenced, what then? I find no figures which apply to the causes of discharge from the houses of correction. At the state prison the figures were:

Received under sentence	134
revocation of parol or permit	21
Returned from other institutions	22
	177
Discharged by expiration of sentence	29
pardon	2
death	13
parol	83
Removed to other institutions	69
	196

The population of the state prison was slightly reduced during the year. About 15% of the prisoners served out their terms. The belief is that in the houses of correction it is even smaller. One effect is this: Neither the sentence stated in the Statutes nor the sentence imposed by the court bears any very real relation to what the convict actually suffers. That is determined by other boards and officials. One evil is that it is determined not in open court but privately. The practice and the theory expressed in the statutes have parted company. They ought to be reconciled.

Note.

The foregoing discussion was submitted by the editor to one familiar with our prison system, who added the following information:

"The surprise with which some of Judge Bell's figures will be read, shows the difficulty we have in realizing the great changes there have been in methods of dealing with crime. For example:—He shows that 49,241 persons arrested for drunkenness were 'released without arraignment.' A few years ago, the phrase would have been unintelligible. Even now, some do not know that the law authorizes the release from the police station of a man known not to be an habitual offender, saving him from exposure in court and a record, and enabling him to keep his work.

"He tells us of the peculiarities of the laws about fines, their collection, etc. Here, too, there has been a great change. Formerly there was little effort to collect fines. In most cases it would have been useless. Commonly, a man was imprisoned for a brief term at the public expense, and released without paying his debt. Now, in thousands of cases, he is put on probation on condition that he pay his fine. In 1920, nearly $70,000 was collected from this source.

"One of the most remarkable facts revealed by Judge Bell's figures is that but two men were pardoned from the State Prison in 1919. A few years ago, the average was 27. An improvement? Yes: 'A pardon not merely releases the offender from the punishment, but obliterates, in a legal contemplation, the offence itself.' (16 Wallace, 151.) A guilty man has no claim to it. Under the new Massachusetts method, he does not get it. But guilty men are paroled—allowed to serve a part of their sentence outside the prison walls, under supervision and control; supporting themselves—released, but *not discharged*. They serve out their full sentences, in custody, but not in prison."

THE LEGISLATIVE HISTORY OF A "STATE PRISON" SENTENCE AS A TEST OF "FELONY" AND "INFAMOUS PUNISHMENT," AND THE PRACTICAL RESULTS IN MASSACHUSETTS.*

One of the most important functions of the superior court is that of selecting the lawbreakers upon whom "infamous punishment" may be imposed. As the consequences are very serious, the processes are hedged about on every hand, lest an error should be made. 115,826 persons were arrested in the State in 1920—nearly 109,000 of them men. From these men the judges of the municipal, police and district courts made a list of eligibles for "infamous punishment," that is, for imprisonment in the state prison. They did not adjudge them guilty of the offences of which they were accused by the police, but passed them along to the superior court on the ground that there was "probable cause" to believe they were guilty.

The statistics of the courts are not classified by sex, but the number of women charged with felony is so small as not to affect the total materially.

Of the nearly 116,000 who were arrested, all but 11,619 had their cases disposed of in the lower courts. 6,775 appealed, and 4,844 others were bound over to the superior court, in most cases because their offences were so serious that the lower courts could not or would not take jurisdiction. This article deals only with these 4,844 cases.

When the lists of those bound over reached the several district attorneys, they examined each case carefully, and presented them to the grand jury. In 403 cases the grand jury differed from the judges of the lower courts, being unable to find evidence enough to warrant indictments, and reported "no bills." They did, however, find indictments against 2,924.

At some point in the proceedings, the district attorneys dropped 404 cases—nol pros'd them. 1,361 cases were also laid on file, before trial. The total of these dispositions of cases is larger than the number which came from the lower courts, because the cases considered included some from the previous year.

*As to the constitutional history of the grand jury and its relation to the term "infamous punishment," see Massachusetts Law Quarterly, August, 1921, p. 214.

The next step was to arraign the indicted. That the machinery used in the previous processes had done comparatively little injustice, is proved by the fact that 1916 of the indicted pleaded guilty and 46 others pleaded "nolo".

The last of the sifting processes was the trial of contested cases—of those who denied their guilt and demanded that the government prove it to the satisfaction of a jury.

Only 383 of the nearly 5,000 made this demand. Only 208 of them were convicted, and only 98 of those were sentenced to the state prison. It will be remembered that the grand juries had thrown out 403 cases of men who had been bound over by the lower courts. Traverse juries threw out 165 more, by verdicts of not guilty. In all, the government failed in 568 of the cases sent up by the lower courts, although, after the binding over, it had opportunity for finding evidence in addition to that presented below.

Then followed the final process—the disposition of the cases. First, 693 of those convicted (on their own pleas or by juries) had their cases laid on file. This in addition to 1,361 laid on file before trial. Next, 804 were put on probation.

Finally, only 759 were sentenced, of nearly 5,000 whose cases were begun. 114 were sentenced to the reformatory, 10 to the reformatory for women and 9 to the state farm. Of the others, some were sent to county prisons, and some paid fines.

Only 98 of the 4,844 who had been eligible to state prison sentences were sent to that institution.

To these facts should be added a statement which will interest taxpayers as well as lawyers—that the expenditures for criminal costs in the superior court last year were $569,912.09! Suffolk County alone paid $44,201.72, merely for jurors! The expenditures for grand juries are not separable from those of traverse jurors; nor are the costs of appealed cases separable from those of grand jury cases, but grand juries considered 3,327 cases, while only 789 cases, of both classes, were tried by juries. A substitution of informations for indictments, if only in the 1,962 cases in which the defendants pleaded guilty or "nolo" would result in enormous saving.

Such a change would also greatly reduce the jail popula-

tion. The average number of prisoners confined in the jails, awaiting trial, is about 300—about one-fifth of the county prison population. A large proportion of these are held for the grand jury. With rare exceptions they will plead guilty, when they have the opportunity, but they cannot plead until they have been indicted. Substitution of informations for indictments for those who wish to plead guilty would hasten the disposal of their cases, reduce the cost of proceedings and abate the very serious evils accompanying the detention of men in idleness while awaiting trial.

These figures are presented, not as a criticism of the action of the court, but that we may have some idea of the cumbersome, clumsy and enormously wasteful system under which we deal with crime, a system which compelled the consideration of 4,844 cases by grand juries, that the 98 who deserved state prison sentences might be discovered.

How could such a system have come into existence? The story of its origin and development is an interesting one, essential to an intelligent consideration of its modification.

When Massachusetts became a state, in 1780, it took over, by special provision of the constitution, all the laws previously adopted by the province or colony. These included some penal laws, and provisions for the punishment of their violation. The English common law offences were also recognized. They included a few serious crimes, designated as "felonies." Authorities differ as to the number, but there were not more than fifteen. In England they were all punishable by death or by forfeiture of estate. The arbitrary administration of these laws by England had been attended by great cruelty and injustice. To make these forever impossible, the framers of our constitution inserted a provision that the legislature "shall not make any law that shall subject any person to a capital or infamous punishment, without trial by jury." The courts of summary jurisdiction were allowed to initiate proceedings in felony cases and if in their judgment there was a probability of guilt, might bind over to the higher courts.

Several colonies became states in 1776 and 1777. As a rule, each of their bills of rights contained an article defining and establishing the rights of persons accused of crime—to guard them from judicial wrongs and secure for them fair trials. Special attention was given to the interests of those

who were charged with the more heinous offences, usually spoken of as "infamous crimes." Details of criminal procedure were fixed, and restrictions and obligations were imposed upon the courts in the exercise of their powers. But when Massachusetts became a state, it took a very different view. It did not recognize any *crime* as "infamous." It was interested to protect its citizens from "infamous punishments." It put its restraints, not upon the courts, by a regulation of criminal procedure, but upon the lawmakers. Other states classified crimes. Massachusetts classified punishments. No matter what a man's crime might be, the legislature should not make any laws providing for his infamous punishment without a jury trial. This distinction between the punishment of an "infamous crime" and the infamous punishment of a crime must be kept in mind in all discussions of this subject. (The federal constitution speaks of infamous "crimes.")

The phrase used in most of the early constitutions spoke of capital or "otherwise" infamous crimes, putting the two classes of crimes on the same level. That of Massachusetts omits the "or otherwise" so that it distinguishes between the two classes—the "capital" and the "infamous," and protects the accused in both cases. (The federal constitution uses the words "or otherwise," and speaks of "crimes" instead of "punishments.")

Just what was an "infamous" punishment, as distinguished from a "capital punishment," was not defined for many years, but it was popularly supposed to be life imprisonment, and possibly other very long terms. Several of the common law crimes punishable by death had been made statutory offences by the colony. The list of English felonies had been shortened from two hundred and more to about a dozen, before Massachusetts became a state.

In 1785 the state revived an old colonial law which provided for spectacular punishments—making the convict stand on the gallows in public, with a rope around his neck; making him stand in a pillory, cropping one ear, branding, etc. They were disgraceful and ignominious, but hardly "infamous," for the law of 1812 (Ch. 134) authorizing imprisonment as a substitute for them, distinctly said that they had been used as punishment for crimes "and misdemeanors" and not for

felonies only. Undoubtedly, in many cases, they were administered summarily, rather than after indictment.

It must be remembered that for the first twenty-five years of statehood, the common jail was the only place of imprisonment. Originally it was not a place of punishment for felons, but only a place of detention for persons who were waiting trial and execution. As a matter of convenience, because there was no other place, it was sometimes used for punishment, even for the execution of a few long sentences, but no "infamy" was attached to other punishments than hanging, which was the penalty for several crimes, and always carried out in the jail.

In 1785 the state made a new experiment in the treatment of offenders. The jails were not buildings in which convicted prisoners could be kept securely, and there were frequent escapes. To prevent this, a law was passed providing that all prisoners who had been sentenced to solitary confinement and hard labor should be sent to Castle Island, a military post in Boston harbor, "under the discipline and command of the officers of the garrison there." It was further provided that "to the end that such convicts should be fully known, and to prevent any person from purchasing their clothing, those who had sentences of twelve months or more should be provided with 'a coat, jacket, and breeches, as a badge of infamy, each of which should be made, half of cloth of one color and the other half of cloth of another color.'" As the parti-colored clothes were worn only while the prisoner remained in the prison, the "infamy" attending the wearing of the "badge" was only temporary, unless he escaped, when it would promote his capture.

Confinement at this military post was not successful, and a new method of preventing escapes was devised, the building of a state prison, of strong, massive masonry, with heavily grated doors and windows, etc.

The law in regard to the construction of the state prison buildings contained a remarkable provision. The agents who were to build them were "directed" to "construct the rooms of such dimensions and in such situations as will, in their judgment, be adapted to the purposes of safe confinement and penitentiary reformation." So far as I know, this is the earliest statutory coupling of "penitence" and "reformation"

with "imprisonment". We may well be proud of the fact that as early as 1803, Massachusetts broke away from the old theory that the sole purpose of imprisonment was punishment, for a past act. Recognizing the greater importance of a prisoner's future, it gave his reformation an equal place in plans for penal treatment.

The statute merely gave directions regarding the construction of the buildings, but the purpose embodied in it was made the permanent policy of the Commonwealth when, in the revision of 1836, it was declared that "The state prison shall be the general penitentiary and prison of the Commonwealth, for the reformation as well as punishment of male offenders." This language was repeated in the succeeding revisions of 1860 and 1882.

In the revision of 1902 the words "for the reformation as well as punishment of offenders" were omitted. Since that time neither punishment nor reformation has been the declared purpose of the state in imprisonment. The statute in its latest form (G. L., c. 125, §11) says:

"The state prison shall be the general penitentiary and prison of the Commonwealth, where all male persons convicted of crime in a court of the Commonwealth, or in any court of the United States, and sentenced by them according to law to solitary imprisonment and confinement in the state prison at hard labor shall be securely confined and employed at hard labor,"—a very clumsy statement of a self-evident proposition.

The state prison of today has little resemblance to that of the early days, as described by the supreme court in 1857. It said:

"The convict is placed in a public place of imprisonment, common to the whole state, subject to solitary imprisonment, to have his hair cropped, to be clothed in conspicuous prison dress, subjected to hard labor without pay, to hard fare, coarse and meagre food and to severe discipline."

All this has passed away. The prison is still a "public place of imprisonment," and is "common to the entire state," but this does not distinguish it, for the same is true of the reformatory at Concord and the state farm, both state institutions, and sentences to solitary imprisonment and confinement at hard labor are now executed in houses of correction, as in the

state prison. The hair of an inmate of the state prison is not cropped, and he is not clothed in conspicuous prison dress.

Not one of the features which in 1857 distinguished the state prison from other penal institutions remains. The treatment of its inmates differs in no respect from that in the reformatory or in the jails and houses of correction.

In fact the state has made imprisonment in the state prison distinctly less penal than that in the jails and houses of correction. In its labor, one of its main purposes is to prepare a prisoner for free life, and its schools and its provisions for moral and religious instruction are far better than those of the jails and houses of correction.

The method of release is based upon the expectation that the lawbreaker will reform. When a prisoner is committed, he is told that he may earn the right to be released after the expiration of two-thirds of his minimum sentence, and when he is released, the state finds him employment and gives him friendly, helpful supervision. All this is inconsistent with the old theory that imprisonment in the state prison is the "infamous punishment" from which the constitution so carefully guarded an offender. It is inconceivable that under one of its statutes the state should attach life-long "infamy" to one of its citizens, to make him an outcast, and under others, at great expense, prepare him for good citizenship, release him before the expiration of his sentence and as far as possible reinstate him in the community, socially and industrially.

The constitution permits infamous punishments, but does not require them. Whether there shall or shall not be any such punishments is left wholly to the legislature, which can do away with them, either by changing the penalties for specific crimes, or the character of the punishment. It has done both. It has abolished the death penalty for several crimes, and it has so changed its penal system that no infamy attaches to imprisonment. To a large extent it has ceased doing things *to* offenders, and is doing things *for* them.

The court said in 1857, that "unless imprisonment in the state prison is infamous, there is no infamous punishment, other than capital." Today, any court which knows the state prison would say, "There is no infamous punishment, other than capital." This is not because it has lowered its

high standards of life, but because it has new standards of treatment for men who have gone astray, and new expectations for them, and aims to restore and reclaim them.

The state prison was opened in 1805. Under legislation enacted a year later, all convicts who were sentenced to solitary imprisonment and hard labor, no matter how short the term, were sent to it. All other sentences were served in the jail. The house of correction, of colonial origin, was solely for minor offenders—vagabonds, etc. The statute of 1811 (Ch. 32) made some changes, but did not alter the law regarding commitments.

In 1818 (Ch. 123, §1) some of the distances being long (Maine was then a part of the state) and facilities for transportation being meagre and the cost burdensome, provision was made that the sentence of a first offender, if it did not exceed three years, might, but not must, be executed in a jail or house of correction—a radical change in the use of the latter.

The law of 1834 (Ch. 151) revising the laws regarding county prisons, retained this provision regarding sentences of first offenders, and it was incorporated in the Revised Statutes in 1836 (Ch. 139), together with a new provision, that no one should be sentenced to the state prison for a less term than one year. This limitation remained unchanged thirty-four years.

The first radical change in the uses of the prisons was made in 1870. The state prison had become overcrowded. To remedy that condition, a law was passed (Ch. 208) providing that, in the discretion of the court, any sentence to solitary imprisonment and hard labor not exceeding five years, might be executed in a jail or house of correction. This put the county prison on the same level as the state prison as a place for the punishment of felonies. One year continued to be the minimum sentence to the state prison.

This permission to use the county prison as a place for the punishment of felons, did not materially lessen the overcrowding of the state prison by short-term commitments, and in 1877 (Ch. 190), another radical change was made. The minimum sentence was increased to three years. All shorter sentences were to county prisons. By this exclusion from the state prison of men who had sentences of less than three

years, many offences which had been felonies became misdemeanors.

In 1895 (Ch. 504) when the indeterminate sentence was adopted, the minimum sentence to the state prison was reduced to two and one-half years—substantially the equivalent of the three years of the definite sentence, less allowance for good behavior.

In 1918 (Ch. 257, §464), the law regarding commitments to houses of correction was so amended that no sentence exceeding two and one-half years shall be served in them, making the maximum sentence to a house of correction and the minimum sentence to the state prison identical.

In none of these statutes is there one line which can be construed as an expression of a purpose of the legislature to differentiate imprisonment in a house of correction from imprisonment in the state prison. All the changes have been made merely to facilitate and improve prison administration, solely as a matter of convenience and to save expense, and not to affect the status of an individual offender in the eye of the law. There has been no indication, in them, that the state desired or intended to add to the brief list, a dozen or so, of offenders upon whom "infamous punishments" were imposed when the constitution was adopted.

It must be remembered that the state prison was established solely because the jails and houses of correction were insecure. At one time it received prisoners on sentences of only a few months, later, a minimum of one year was fixed, followed by a provision that if the convict was a first offender he might be imprisoned, in a county prison. Later, solely on account of overcrowding of the state prison, authority was given to sentence a man to a jail or house of correction for five years, and as that did not prevent the overcrowding, all who had sentences of less than three years were excluded, and still later this was reduced to two and one-half years. Every raising of the minimum limit took a considerable number of offences out of the category of "felonies" and made them "misdemeanors." The boundaries of the two classes were movable, at the discretion of the legislature.

It is necessary, however, to consider other legislation. The judicial opinion which led to the enactment of the present law defining "felony," was rendered in 1852, in the trial of

one Stephen Carey for murder. (*Com.* v. *Carey*, 12 Cushing, 246). The accused had been arrested without a warrant by the keeper of a railroad station (a constable) who believed he had broken into the station to steal. He demanded that the constable show his authority, and soon after, while the officer was busy, jumped through a window and ran. The officer pursued and was overtaking him, when he fired and killed his pursuer.

On his trial for murder, his counsel asked the court to rule that as the act of the accused was not a felony, he could not be arrested legally without a warrant.

Chief Justice Shaw, speaking for himself and his associates, Justices Fletcher and Bigelow (a majority of the supreme court), ruled that a constable or other peace-officer could not arrest a person without a warrant, for a crime proved or suspected, if such a crime were not an offence amounting in law to felony.

"This is the old established rule of the common law, adopted and acted upon in this Commonwealth, by which courts of justice are bound to be governed until altered by the legislature." The jury, thus instructed, returned a verdict of manslaughter.

Referring to the fact that legislation had obliterated in a great measure the line of distinction between felonies and misdemeanors, the court said that, "It had not changed the rule in question," and added this suggestion:—

"Perhaps it might be more wise in the legislature to make the rule in question applicable to offences by a different standard of aggravation—by being punishable in the state prison or otherwise."

Apparently the legislature of 1852 acted under a misapprehension of this suggestion. The court did not recommend that the legislature define a felony, but merely suggested that it change the old common law *rule regarding the right to arrest without a warrant*, so as to authorize such arrests in other cases. A score of such statutes have since been enacted, broadening the rule. Instead of merely amending the *rule*, as suggested, the legislature passed a law (Ch. 37), defining a felony as an offence punishable by death or imprisonment in the state prison. No matter where his sentence is served, or how brief it may be, even if he is put on probation, a man who

might have been sentenced to the state prison, is forever a "felon," with all which that implies.*

In 1857 the supreme court (divided) rendered a very important decision regarding "infamous punishment." (*Jones* v. *Robbins*, 8 Gray, 349). The question at issue was whether a man could be held to answer in a court which had neither a grand jury nor a traverse jury, for a crime punishable by imprisonment in the state prison.

The opinion of the court was that he could not be so held, the consideration of the question "leading to a strong conclusion of the general understanding of the legislators and jurists of Massachusetts, that punishment in the state prison is an 'infamous punishment,' and cannot be imposed without both indictment and trial by jury."

The reasoning by which the court reached its opinion included the following:

"It seems to us that, whether we consider the words 'infamous punishment' in their proper meaning, or as they are understood by the constitution and laws, a sentence to the state prison for any term of time, must be considered as falling within them. The convict is placed in a public place of punishment, common to the whole state, subject to solitary imprisonment, to have his hair cropped, to be clothed in conspicuous prison dress, subjected to hard labor without pay, to hard fare, coarse and meagre food, and to severe discipline.

"Some of these, a convict in the house of correction is subject to; but the house of correction, under that and the various names of workhouse and bridewell, has not the same character of infamy attached to it.

"Besides, the state prison, for any term of time,† is now substituted by law for all the ignominious punishments formerly in use; and, unless this is infamous, then there is no infamous punishment, other than capital."

*NOTE.—The Montana statutory definition of a felony, (Revised Codes, Section 8109) "A crime which is punishable with death or by imprisonment in the State Prison" seemed to the legislature so absurd that it qualified it by adding a proviso that, "When a crime is punishable by imprisonment in a county jail, in the discretion of the court or jury, it is a misdemeanor for all other purposes, after a judgment imposing a punishment other than imprisonment in the State Prison." The proviso is as absurd as the original, but, at least, it was a recognition of the necessity for reconciling its definition with common sense.

†NOTE.—In that year, of the 160 committed to the state prison, 17 had sentences of only one year, and 18 others of less than two years. Only 15 had sentences of ten years or more, for serious crimes.

It is not surprising that the court, in its discussion of felonies, should have ignored, wholly, the absurd definition given by the legislature in the statute of 1852.

It is this decision which has made it necessary for a grand jury to consider every case in which the offence charged is punishable by imprisonment in the state prison, no matter how unimportant it may be.

Prior to 1836, there had been no statutory regulation of the initiation of proceedings in criminal cases, nor any legislation regarding the rights of accused persons.

In that year the subject was considered by the legislature, on the report of the commission on the revision of the statutes, which had come to the same conclusion reached by Judge Shaw twenty-one years later.

It recommended a new statute, that "No person shall be held to answer in any court (except in cases of the militia when in actual service), for any crime or offence which may be punished by death, or by imprisonment in the state prison, unless upon indictment by a grand jury."

Regarding this provision, the Commissioners said: "Our constitution does not mention an indictment, but declares that 'No subject shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally, described to him.' This would apply as well to an information, but the practice has been, at least since the adoption of the constitution, to prosecute felonies, and all high or aggravated crimes, only by indictment. And it seems proper to require the practice to continue, in cases where the punishment is death or imprisonment in the state prison."

The legislature, however, took a different view, and adopted a section (R. S. Ch. 123, § 1) reading as follows: "No person shall be held to answer in any court, for an alleged crime or offence, unless upon indictment by a grand jury, excepting in the following cases:

"First, when a prosecution by information is expressly authorized by statute;

"Secondly, in proceedings before a police court or justice of the peace;

"Thirdly, in proceedings before courts-martial."

In subsequent revisions of the statutes, this provision be-

came section 3 of chap. 158 of the General Statutes, and section 4 of chap. 200 of the Public Statutes.

In the revision of 1902 the form, but not the substance, was changed. It became section 3 of chapter 205 of the Revised Laws, as follows:

"No person shall be held to answer in any court for an alleged crime, except upon an indictment by a grand jury, upon a complaint before a police, district or municipal court, or trial justice, or upon proceedings before a court martial."

It appears in the General Laws in substantially the same form, as section 4 of chap. 263.

A careful consideration of this history is necessary, if we are to determine whether the constitution requires the perpetuation of our present system, or permits a modification which will bring judicial proceedings into accord with modern views of crime and modern penal methods.

The crucial question, in reaching this decision, is, What is the "infamous punishment" from which the constitution so carefully guards every citizen?

We know what it was when the constitution was formed—that it described only capital punishment and punishments which worked a forfeiture of estate. These were imposed solely for felonies, and not for all of those. And what are "felonies"?

Chief Justice Shaw, in the opinion of the court in the case of *Jones* v. *Robbins* (8 Gray, 347), says they were "crimes of great magnitude and atrocity."* There can be no better definition. England had had some two hundred felonies, punishable by death or forfeiture of estates, but at the time when Massachusetts became a state had eliminated all but a very few. The English common law felonies, excepting a few which had been made statutory, were taken over by the new state.

The legislature of 1852, in making its wholesale definition of felonies, gave no consideration to the scores of crimes which it placed in a new category. In the first twenty-five years of

*NOTE.—"Atrocity" is one of the words used in the statute to describe one of the elements of first degree murder, (G. L. 265, §1). There were no degrees of murder until 1858, when murder in the second degree was defined, (Ch. 154). Burglary, the perpetrator being armed; rape; robbery, being armed, and arson were all punishable by death when the constitution was adopted, and life imprisonment was almost unknown.

the life of the state, as life became more complex, new offences had been created, punishable in the jails. When the state prison was established, it was decided that those who had sentences to solitary imprisonment and hard labor, and no others, should be sent there. All other sentences were executed in jails.

It was a rude attempt at classification, based upon the assumption that to require a prisoner to work hard during his imprisonment was a disgrace, to be attached only to those who had committed serious offences. Later, hard labor was characterized as one of the distinguishing features of infamous punishment!

When the new state prison was established there were three kinds of statutory penalties for serious crimes:

1. For some, solitary confinement, followed by imprisonment at hard labor, for a term fixed by the statute.

2. For others, solitary confinement, followed by imprisonment at hard labor for a term fixed by the court.

3. For still others, either solitary confinement, followed by imprisonment at hard labor, or mere imprisonment—within fixed statutory limits in both cases.

In imposing the first, the court had no discretion; in imposing the second, it had discretion as to the length of the solitary confinement and as to the term of imprisonment at hard labor; in imposing the third, it might, in its discretion, include or omit "solitary and hard labor." If the sentence was to solitary confinement and hard labor, it must be served in the state prison. If (the offence being the same) the requirement of solitary confinement at hard labor were omitted by the court, the convict could not be sent there, but his sentence must be executed in the jail. Under this scheme some men were sent to the state prison for a few months, while others, with sentences of years, were sent to jails.

This curious result followed: In cases of the first class, in which the statute itself fixed solitary imprisonment and hard labor as the penalty, the *law* made the offender "subject to infamous punishment;" in cases of the second class, the law did the same, but left the amount of the punishment at the discretion of the court. In cases of the third class, the law made the offender, potentially, "subject to infamous punishment," but allowed *the court* to say whether he should

actually be subjected to it, or be "let off" with a non-infamous punishment. Having, by jury trials, protected from infamous punishment all who have committed a given offence, it permitted the court to determine which of them shall undergo it and which should escape it!

This plan of allowing the court to decide whether a man convicted of a felony shall or shall not be subjected to infamous punishment is still in vogue. As to a few crimes, the law fixes the penalty, but for most of the less serious, authority is given to the court to send a man to the state prison or to a house of correction.

The Massachusetts plan of making "infamy" depend upon the place of punishment, instead of resting upon the crime, involved a distinct loss. It changed moral values by obliterating moral distinctions. Infamy is an element of punishment. The sense of shame, stronger then than now, is a powerful emotion, and has some deterrent effect, but when the stealing of one hundred and one dollars attaches the same infamy as the stealing of one hundred and one thousand, an imprisonment for two and one-half years as much as a life sentence for second-degree murder, the sense of injustice becomes stronger than the sense of shame.

One of the worst features of the present laws is that they authorize the same *kind* of punishment for a man who has a life sentence and one who is held for but a few months. They are served under the same conditions, and differ only in their length. There is no reason for imposing infamous punishment upon a man who has committed a petty offence. Is it not more reasonable to believe that in putting together in the same institution men who have short sentences and those who are to be held for life, the state intended to abolish the distinctions between infamous and non-infamous punishments, than to believe that it intended to impose infamous punishments upon petty offenders?

Of necessity the place and functions of the grand jury have greatly changed with the change in methods of detecting crime. In earlier days, when nearly all felonies were punished by death, it had an important place as a discoverer of serious crime, and as a responsible accuser. When prosecution and persecution were sometimes almost synonymous, limitation of accusations to those made by the grand jury was a pro-

tection of the citizen from oppression and injustice on the part of the government, and from loss of character by "public clamor or private malice." It was well, in view of the serious consequences which might follow, that no man should be put on trial—usually for his life—until a majority of a lawfully constituted body of inquiry had found probable cause to believe him guilty.

But with the creation of police forces, the function of the grand jury as a discoverer of crime has practically ceased. Almost without exception, the man indicted for crime has already been arrested and is in custody. The police authorities have gathered the evidence against him, and as a rule the grand jury merely reviews it and decides whether or not it is sufficient to warrant an indictment. The police have taken over its inquisitorial functions, and it rarely seeks evidence not presented by the prosecuting officer.

The care taken to protect the citizen from the injury which might come from mere rumor, was formerly so great that a grand jury was not even allowed to mention the fact that it had considered a question of his possible guilt. Now, within a few hours after his arrest, the newspapers have announced it, and the details of his crime are known to the public. If he is not indicted, he is obliged to depend upon the newspaper report of "no bill" in his case, to undo the harm which came from the story of his arrest.

These changes do not call for the abolition of the grand jury, but they do tend to affect its use, and to cause a return to its original function, as the only official accuser in cases in which the punishments are severe.

But where all distinctions between major and minor crimes have been broken down, and the great majority of those accused of technical felonies have committed merely petty offences, it is a great waste of effort and money, with no gain, to require that all cases which might be punished by imprisonment in the state prison shall be prosecuted only on indictment. The original purpose was to protect a citizen from being sent to the state prison unjustly, but the time has come to consider the modification of a system under which the grand jury is obliged to consider nearly 5,000 cases, to discover the ninety-eight who deserved state prison sentences.

The fact that nearly 2,000 pleaded guilty as soon as they

had the opportunity, and that only 383 wanted a jury trial, shows the unwisdom of the present system. Why should it be necessary for a grand jury to go through the form of indicting a man who is ready to plead guilty?

Among the changes needed is a modification of our definition of felony, in the interest of an accurate use of language. It is doubtful if a definition is needed, or is of any material value. There was none for the first seventy-two years. That which was made in 1852 reversed the English policy, under which a very long list of felonies had been reduced to a very few. It multiplied felonies a dozen times, without reason. It was, and is, grossly inaccurate. For example, calling a second theft of a bicycle "a felony" does not make it a felony. The new definition should make a clear distinction between major crimes, "of great magnitude or atrocity," to use Judge Shaw's definition, and minor offences. The crimes which are punishable only by imprisonment in the state prison should be the only "felonies."

The purposes and uses of the state prison should be stated clearly—that it is a place for the reformation of its inmates during their imprisonment.

The grand jury would keep its place for crimes classified as felonies under the new definition, and to be prosecuted on indictment, but provision should be made for prosecution of other cases on information. The supreme court has said that an information conforms to the constitutional requirement that "no subject shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally described to him." It has also said that an accused person may waive his constitutional rights, like that of having his case considered by a grand jury. Imprisonment in the state prison has been made correctional and reformatory, instead of "infamous," and the need of indictment is removed.

In many states informations have taken the place of indictments, excepting in capital cases. Certainly, if the accused so requests, thereby waiving his grand jury rights, he should have the privilege of doing so. In states where this is done, the great majority of those accused make this waiver, at a great saving of time and expense.

WARREN F. SPALDING,
Asst. Secretary Massachusetts Prison Association.

Note.

The Minnesota law (Gen. Laws 1913, Section 9159) authorizing prosecution on information instead of indictment, provides that the courts shall possess and may exercise the same power and jurisdiction to hear, try and determine prosecutions upon information, for offences punishable by not more than ten years' imprisonment in the State Prison, which they have in prosecutions on an indictment, and all the methods of procedure are the same.

Section 9160 provides that the offence charged in any such information shall be stated in plain and concise language, without prolixity or unnecessary repetition, and all the provisions of law relating to indictments apply to informations.

Section 9162 contains a special provision for hastening the disposition of the cases of an accused person who does not wish to wait for the criminal term of the court, but is desirous of pleading guilty and taking his sentence. On his written application to the court, stating that he desires to plead guilty to the charges made against him, or to a lesser degree of the same offence, the court has power to direct the county attorney to file an information against him. On the filing of the information and of the application, the court may receive and record a plea of guilty, and cause judgment to be entered thereon and pass sentence. This can be done either in term time or on vacation, and at any place in the county which the court may designate. This is, practically, a waiver of his grand jury rights.

Those who wish to have their guilt determined by a jury are obliged to await the holding of a criminal term of the court.

Many of the counties are large, and the terms of court are infrequent. More than seventy per cent of the commitments to the state prison and the state reformatory are made under this section.

The Georgia definition of "felony" is more accurate than those of most of the states. It is as follows: "The term felony means an offence, for which the offender, on conviction, shall be liable to be punished by death or imprisonment in the penitentiary *and not otherwise*. This excludes, as it should, the offences punishable by either imprisonment in the penitentiary *or* in the jail or house of correction.—Penal Code, § 2.

DRAFT OF AN ACT TO PROVIDE FOR THE MORE PROMPT DISPOSITION OF CRIMINAL CASES IN THE INTEREST OF JUSTICE.

SECTION 1. A Justice of a district court may at the written request of the Chief Justice of the Superior Court sit in the Superior Court at the trial or disposition with or without a jury in any part of the Commonwealth of criminal cases in which the alleged offense is punishable by not more than five years in the state prison and during the continuance of such request shall have and exercise all the powers and duties which a Justice of the Superior Court has and may exercise in the trial and disposition of such cases, provided, however, that no special justice of a district court shall so sit and that no justice so sitting shall act in a case in which he has either sat or held an inquest in the district court.

SECTION 2. The Chief Justice of the Superior Court may arrange for the holding of special sittings for the trial and disposition of such cases and for the attendance of jurors therefor as the interests of justice and the prompt disposition of such cases may in his judgment require. Such special sitting may be held simultaneously with other sittings of the Superior Court or at other times in the discretion of the Chief Justice.

SECTION 3. When a justice of a district court sits in the Superior Court as above provided, the fact of his holding court and the request of the Chief Justice of the Superior Court shall be entered upon the general records of the court but need not be stated in the record of any case heard by him.

SECTION 4. Justices of District Courts when sitting in the Superior Court as herein provided shall receive from the Commonwealth compensation in addition to their regular salary upon certificate of the Chief Justice of the Superior Court at the rate of dollars per day and the amount of expense incurred by them in the discharge of their duties in connection with such sittings. The compensation of special justices for services in holding sessions of a district court in place of a justice of a district court while sitting in the Superior Court as herein provided shall be paid by the

county and shall not be deducted from the salary of justice so sitting in the Superior Court but shall be repaid to the County by the Commonwealth.

(Cf. General Laws C. 212 Sec. 27
C. 218 Sec. 6.)

Note.

On page 102 of the Second and Final Report of the Judicature Commission appears the following suggestion:

> "that all appeals in criminal cases from the district courts, and all indictments for misdemeanors and for lesser felonies, should be tried in the Superior Court with juries, and with a district judge of the county presiding, so that it would be a sitting of the Superior Court for criminal business with juries, only presided over by a district judge. Prosecutions would as now be conducted by the district attorney or his assistants. The great advantage of this scheme is that it would utilize existing machinery without the creation of any new courts or officers, would avoid the congestion of criminal business by providing the means for a speedy trial of all cases, and lessen the evils already described. We recommend the serious consideration of this suggestion."

This plan was brought to their attention shortly before the report was to be filed so that they had not time to prepare a draft of legislation to carry it out. The plan (but not the above draft) was recently discussed at the meeting of the Massachusetts Bar Association at New Bedford, as reported in this number of the magazine. It seems to be a business-like method of dealing with the congestion of criminal appeals in the Superior Court. For the purpose of provoking discussion and focussing attention upon the problem the foregoing draft of legislation has been prepared and submitted to Judge Sheldon and Messrs. Nutter and Green, the former commissioners who recommended the plan. It is now submitted for public consideration. There seems to be no occasion for limiting the use of district judges to their own county. Indeed it

would not be advisable. If the other recommendations of the Commission of providing for election by defendants in the district court and immediate removal to the Superior Court if a jury trial is elected should be adopted (see Report, pp. 95-96) then such removed cases could be heard with a jury by district judges as provided in the proposed act and thus congestion of removed cases could be avoided. The change of a few words in the act would cover the point of jurisdiction. The successful experience with the system of election in Maryland described by Judge Bond in Massachusetts Law Quarterly for May, 1921, p. 89, seems to furnish additional support for the proposal to try it in our district courts.

It should be noticed that the proposed bill provides merely that District Court judges may sit *in* the Superior Court for certain purposes, thus merely exercising in one room of the courthouse called the "Superior Court" certain limited jurisdiction and powers which the legislature has an undoubted right to confer upon them in another room of the courthouse called the "District Court." Accordingly no constitutional question is involved. (See Report of the Judicature Commission, p. 60, Mass. Law Quart., Jan., 1921.)

F. W. G.

The foregoing draft of legislation has been submitted to us and seems a simple and appropriate method of carrying out the substance of the plan recommended by us as members of the Judicature Commission.

HENRY N. SHELDON,
GEORGE R. NUTTER,
ADDISON L. GREEN.

Since the draft was submitted to the former commissioners, it has been suggested that the following should be added at the end of Section 1:

"Section twenty-seven of Chapter twelve of the General Laws shall apply to sittings under this act."

F. W. G.

REMARKS IN THE UNITED STATES SENATE ON THE CROWDED DOCKETS OF THE FEDERAL COURTS.

Recently Senator Spencer of Missouri presented to the Senate an article from the Central Law Journal by Mr. Thomas W. Shelton of Virginia on the need of relief for the Supreme Court of the United States. Thereupon the following discussion took place:

MR. SPENCER.—Mr. President, the article which I have presented, and which has been ordered printed in the RECORD, deals entirely with the overburdened docket of the Supreme Court of the United States. What is true of that court, as Mr. Shelton so clearly outlines, is even to a greater degree true in regard to the United States district courts in the several districts of the United States. I ask that there may also be printed in the RECORD a brief summary of the actual conditions of the dockets of the United States district courts which was furnished me within the last day or two from the office of the Attorney General. This summary shows an intensely interesting state of affairs. There were in 1913, the year before the World War, 52,618 cases commenced in those courts; there were at the end of that year 102,012 cases pending.

If we turn from 1913 to the last year, we find that instead of 52,618 cases having been commenced there were 104,000 cases commenced, which is nearly accurate, though it is partly an estimate, because a few of the reports have not yet been received. Of those 104,000 cases which were commenced in the United States district courts in the year 1920 more than 70,000 were criminal cases. The burdening of the dockets of the courts which have to deal with the great questions of the constitutional rights of the individual with a lot of cases the punishment of which characterizes them as misdemeanors is something which should give us great concern.

This summary also shows that there were pending at the end of the year 1920, 140,000 cases in the United States district courts, as compared with 102,000 cases in 1913. The

condition is one that, of course, interests us and one with which sooner or later we shall have to deal.

Mr. President, if there is no objection, I ask that the table of cases I have presented, setting forth the facts I have stated and the data for other corresponding years, together with a statement of the expenditures incident to the Federal judiciary, may be inserted in the RECORD for our information.

MR. KING of Utah.—I hope that the table which has been submitted by the Senator from Missouri may also be referred to the Committee on the Judiciary. Some time ago, at the request of a member of the Federal judiciary, I called the attention of the Senate to the enormous amount of work which is now devolving upon the Federal judges, resulting largely from misdemeanor cases, as indicated by the Senator from Missouri. Nearly all of the 70,000 new cases are misdemeanor cases, which ought to be tried by a justice of the peace or by some inferior tribunal. I suggested at that time, and I beg leave to repeat the suggestion, that the Judiciary Committee take cognizance of the situation. I think some instrumentality, some judicial tribunal, may be devised, supplementary to the present Federal courts, in order to handle the misdemeanor cases. If that were done, then the Federal courts could go on looking after the important cases and the little misdemeanor cases, the petty cases, which ought not to be in the existing Federal courts, could be disposed of by the inferior tribunals.

MR. SPENCER.—May I say to the Senator from Utah—and doubtless there will come some suggestion from him that will remedy the situation—that the difficulty lies in the fact while everybody would agree that there ought to be some commission or some inferior tribunal created that would immediately proceed to determine these misdemeanor cases, but under the Constitution of the United States every inferior court which has to do with Federal business is a life office, holding during good behavior, and when we appoint a judge to try misdemeanor cases we have in fact created a new Federal judge, whose term of office may run long after the emergency which caused the creation of the office has ceased to exist.

MR. KING.—I appreciate that; but, in my opinion, the business of the Federal courts in the future will continue to in-

crease, and we could well have some permanent inferior tribunal as a sort of an adjunct to the district courts to take up unimportant matters and to act as referee in bankruptcy and in other matters.

MR. MCKELLAR of Tennessee.—I wish to say to the Senator, in view of what he has just said about the crowded dockets of the Supreme Court and of the district courts, that the same statement holds true of a number of the circuit courts of appeal of the United States, notably in the circuit where the Senator from Missouri has his home, the eighth circuit, the docket of which is crowded, so that the court is more than two years behind. In like manner in the sixth circuit the circuit court of appeals is about two years behind. In the fifth circuit the court is not so far behind, but in the second circuit it is very far behind. The same crowded condition exists in all the Federal courts, both in the appellate courts and in the district courts.

MR. SPENCER.—I think the Senator from Tennessee is entirely right.

MR. POMERENE of Ohio.—In view of the statement which has been made, it may be interesting to say a word with regard to the conditions in the Federal court at Cincinnati. Some months ago a movement was set on foot to create a new judgeship in that district. The United States district judge, Hon. John Weld Peck, wrote me on the subject. He has been on the bench about two years. When he was appointed the docket was overcrowded. Now, he is up with his docket, and during the last year he was assigned to Memphis, Tenn., and served one month there, and was subsequently assigned by the Chief Justice of the United States to go to New York, where he also served one month. He is on his job all the time.

MR. KING.—We want more judges like him.

MR. HARRELD of Oklahoma.—I should like to ask the Senator from Missouri if his investigations did not disclose that because of the conjested condition of the court dockets there are being lost to the Treasury of the United States large amounts of money in fees, fines, and forfeitures? I should like also to inquire if, as a matter of fact, it would not be along the lines of economy to have more judges so as to take care of the congested condition of the business of the Federal courts? In

my State a short time ago I made an investigation, and have the figures which show that in the eastern district in my State there is such congestion—and great complaint is made of that—that many cases are being held up, and the Government is absolutely losing money in the way of fines and forfeitures. In my judgment, in that State at least, it would be a matter of economy to provide an additional judge. I wish to know if that is not true also in a great many other districts?

MR. SPENCER.—There can be no doubt, I think, as to the truth of what the Senator from Oklahoma has said.

The table referred to follows on next page.

Comparison of business and expenditures — Department of Justice and United States courts.

(Includes all cases brought before the United States district courts, excluding naturalization papers.)

	1912	1913	1914	1915	1916	1917	1918	1919	1920	1921
BUSINESS UNITED STATES DISTRICT COURTS.										
Cases commenced ...	50,691	52,618	57,646	62,768	64,963	62,017	72,237	80,291	91,254	[1] 104,000
Increase, number of cases	.....	1,927	5,028	5,122	2,195	*2,946*	10,220	8,054	10,963	....
Increase, per cent ...	.....	3.8	9.5	8.8	3.5	4.5	*U*16.4	11.1	13.6	.....
Cases terminated	46,648	53,450	56,336	60,393	75,502	65,955	85,441	83,422	68,735	[2] 85,000
Increase, number of cases	.....	6,802	2,886	4,057	15,109	*9,547*	19,486	*2,019*	*14,687*	.....
Increase, per cent....	.....	14.5	5.4	7.1	25	*12.6*	29.5	*2.3*	*17.6*	.....
Number of cases pending at close of year,	102,299	102,012	120,208	132,102	129,421	118,926	100,389	96,255	118,744	[2] 140,000
EXPENDITURES.										
Justice	$5,217,912.01	$5,569,228.57	$5,743,110.32	$5,743,064.35	$5,830,250.81	$5,917,202.50	$7,904,336.82	$9,324,827.76	$9,913,872.15	.....
Courts	4,978,660.90	4,925,431.97	4,992,808.30	5,020,163.60	4,995,283.11	5,053,322.56	5,584,935.43	5,771,938.15	6,643,490.29	.....
Total...	10,196,572.91	10,494,660.54	10,735,918.62	10,763,227.95	10,825,533.92	10,970,525.06	13,489,272.25	15,096,765.91	16,557,362.44	[2] 17,900,000
Increase, amount....	.....	298,087.63	241,258.08	27,309.33	62,305.97	144,991.14	2,518,747.19	1,607,493.66	1,460,596.53	[2] 1,400,000
Increase, per cent....	.....	2.9	2.3	$\frac{1}{4}$ of 1	$\frac{6}{10}$ of 1	1.3	22.9	11.9	9.6	[2] 9
Special items	.....	.....	.....	.....	.....	.....	$783,320.19	$1,122,574.11	$772,269.49	....

[1] Estimated, of which 70,000 are criminal cases.

[2] Estimated.

NOTE. — Figures in italics indicate decreases.

THE ELASTICITY OF THE ENGLISH JUDICIAL SYSTEM.

The following note appears in the *Solicitors Journal* of October 22, 1921.

"UNCONVENTIONALITIES OF THE BENCH.

Three incidents of the past six months mark the growing unconventionality of our age, and its disdain of ceremonialism which is extending even to the judicial bench. The Lord Chancellor marked a new era when he left the isolation of the Woolsack to act as an additional first instance judge in the divorce court. Lord Mersey, once president of that division of the high court, and now for ten years entrenched in the dignity of the House of Lords, revisited his old sphere —dressed in plain mufti—to dispose of an undefended divorce list at the request of Lord Birkenhead. And now we read in the press how Lord Buckmaster, an ex-Chancellor, happening to wander casually into the law courts, was pressed into service as an additional judge of the King's Bench; indeed, the case he tried and disposed of is reported in *The Times*. In the nineteenth century these things would have been impossible—nay, they could not have happened even in pre-war days. Now no one attaches any importance to them, or even regards them as unusual: so far have we moved from the old English traditions which reached their climax in the Victorian age. * . * *

LORD CHANCELLORS AS FIRST INSTANCE JUDGES.

Of course, it must not be forgotten that in the pre-Victorian age, our Chancellors were essentially first instance judges; they sat in chancery as a matter of course, and Lord Eldon's great decisions were given in that capacity. Indeed, the old rule was that the decision of a Chancellor, sitting as a judge in chancery, was equal in weight to that of two lord justices sitting as an equity court of appeal in days before the Judicature Act, 1873. But, after Lord Eldon's days, the tendency of Chancellors was to leave ordinary judicial work to the

Vice-Chancellors, and stick to the House of Lords. Brougham and Lyndhurst, indeed, not infrequently sat as first instance judges, but their successors gradually abandoned the practice, although even as late as the beginning of the twentieth century, Lord Halsbury sometimes sat in his own court to dispose of 'wards in chancery' and other cases. * * * *''

Note.

The elasticity of the English system, illustrated by the facts above stated, is interesting and deserves consideration in connection with the present lack of elasticity in our own system and the recommendations of the Judicature Commission for the occasional use of Superior Court judges as single justices in the Supreme Judicial Court and of District Court judges for the trial of certain criminal cases with juries in the Superior Court, when necessary to relieve congested dockets. See draft of an act and note on pages 109-111 of this number.

F. W. G.